Supreme Court, U.S.
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No. 90-5193

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

DAWUD MAJID MU'MIN,
Petitioner,

v.

VIRGINIA,
Respondent.

On Writ of Certiorari to the Supreme Court of Virginia

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED JULY 18, 1990
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TABLE OF CONTENTS

	Page
Chronology of Relevant Events	1
Petitioner's Proposed Voir Dire Questions	2
Excerpts from Pretrial Motions Hearing	8
Excerpts from Voir Dire	42
Opinion of the Supreme Court of Virginia, *Dawud Majid Mu'Min v. Commonwealth of Virginia*, 239 Va. 433, 389 S.E.2d 886 (1990)	95
Order of the Supreme Court of Virginia, March 2, 1990	125
Order of the Supreme Court of Virginia denying rehearing, April 20, 1990	126
Order of the Supreme Court of the United States granting certiorari and leave to proceed in forma pauperis, October 9, 1990	127

CHRONOLOGY OF RELEVANT EVENTS

DATE	PROCCEDINGS
September 22, 1988	Gladys Nopwasky is killed in Prince William County, Virginia
October 3, 1988	Petitioner is arrested for the murder of Ms. Nopwasky
October 3, 1988	Petitioner is indicted for capital murder
April 14, 1989	Trial Judge denies petitioner's motions for individualized voir dire and refuses to ask questions regarding what the members of the venire had seen, heard or read about the offense or petitioner's case
April 17, 1989	Petitioner's trial commences in Prince William County
April 20, 1989	Petitioner convicted of capital murder
April 24, 1989	Jury recommends death sentence
June 12, 1989	Trial Judge sentences petitioner to death
March 2, 1990	Virginia Supreme Court affirms petitioner's conviction and sentence of death
April 20, 1990	Virginia Supreme Court denies petition for rehearing

IN THE CIRCUIT COURT OF
PRINCE WILLIAM COUNTY, VIRGINIA

Criminal No. 23103

VIRGINIA

v.

DAWUD MAJID MU'MIN,
Defendant

PETITIONER'S PROPOSED VOIR DIRE QUESTIONS

1. Is anyone acquainted with the victim, Gladys Nopwasky, her husband, or any member of her family?
2. Has anyone ever been employed by, or had any other connection with, the victim's business, Dale City F'loors in Ashdale Plaza on Dale Boulevard in Dale City, Virginia?
3. Does anyone have family or friends who were ever employed by or had a connection with the victim's business, Dale City Floors?
4. Has anyone patronized Dale City Floors?
5. Do any of you live within a mile of Ashdale Plaza?
6. Are any of you related to or acquainted with any of the prosecutors or Commonwealth's Attorneys for Prince William County, and in particular with Mssrs. Paul Ebert or William Ryland?
7. Did any of you participate in or contribute to any of the election campaigns of Mr. Paul Ebert for Commonwealth's Attorney?

8. Did any of you attend any campaign meetings or rallies in his behalf?
9. Is anyone related to or acquainted with Mr. David Mabie?
10. Are any of you related to or acquainted with any of the following individuals, who may be called as witnesses by the prosecutor in this case:

10a. Do any of you have law enforcement officers as friends or neighbors?

10b. Do any of you hold jobs with the highway department?

10c. Have any of you held such a job in the past?

10d. Do any of you have family or friends who hold, or used to hold jobs with the highway department?

10e. Do any of you hold jobs with a department of corrections, or jail or prison?

10f. Have any of you held such a job in the past?

10g. Do you have family or friends that hold, or used to hold jobs with a department of corrections, jail or prison?

11. Do any of you now hold a law enforcement job?
12. Have any of you held such a job in the past?
13. Do any of you have family or friends who hold, or used to hold law enforcement jobs?
14. Do any of you believe that the testimony of a police officer or investigator carries more weight than the testimony of an ordinary citizen witness?
18. Have any of you appeared as a witness for the prosecution in a criminal case?
19. Have any of you served on a jury before?

20. Have any of you served on a jury in a criminal case?

21. Have any of you served as foreman of a jury?

22. Were any of you acquainted with one another prior to appearing in court today?

23. Have any of you been victims of crime?

24. Do any of you have family members who have been victims of crime?

25. Do any of you have friends or neighbors who have been victims of violent crimes, such as rape, robbery, murder or assault and battery?

28. Have any of you been the victim of a racial incident involving a black person?

29. In this case the defendant is black. The victim was a white female. She was found nude from the waist down. Do any of you believe that your deliberations might be affected by these facts, so as to create any bias or prejudice?

30. Are any of you opposed to the Islamic religion?

31. Section 8.01-358 of the Code of Virginia laws requires that a juror, knowing anything relative to the facts of a case, shall disclose what he or she knows in open court.

    Have you acquired any information about this case, from the newspapers, television, conversations or any other source?

32. What have you seen, read or heard about this case?

33. From whom or what did you get this information?

34. When and where did you get this information?

35. Have you discussed this case with anyone?

36. With whom?

37. When and where?

38. What did you discuss?

39. Have you formed an opinion or conclusion about this case?

40. What is it?

41. Has anyone expressed any opinion about this case to you?

    Can you disregard anything that might have been said and try this case on the law and the evidence you hear in this Court Room?

43. Do you have any opinion or view as to the death penalty, either for it or against it?

44. What is that opinion or view?

45. Is that a view you hold strongly?

46. How long have you held that opinion?

47. Would your opinion or views in favor of the death penalty have any effect on your choice between death and life in prison as punishment in an appropriate case?

47a. What does a life sentence mean to you?

47b. Do any of you believe that the decision on whether or not to impose the death penalty should be made just on the facts of the murder itself, and that mercy should have nothing to do with it?

47c. Do any of you believe that the decision on whether or not to impose the death penalty should be made just on the facts of the murder itself, and the jury should not consider the defendant's history or special circumstances?

47d. In choosing between death and life in prison as punishment in a capital murder case such as this, would you be willing to consider evidence that at the time of the murder the defendant was a state prisoner and the people charged with his supervision should not have allowed him to be at the scene of the crime?

48. In this case the defendant is charged with willful, deliberate and premeditated killing of a person in the commission of robbery while armed with a deadly weapon. If he were found guilty of that charge beyond a reasonable doubt, do you believe that death is the only appropriate punishment?

49. Is that a view you hold strongly?

50. Would it be hard for someone to change your mind?

51. In this case the defendant is charged with the willful, deliberate and premeditated killing of a person in the commission of, or subsequent to, rape. If he were found guilty of that charge beyond a reasonable doubt, do you believe that death is the only appropriate punishment?

52. Is that a view you hold strongly?

53. Would it be hard for someone to change your mind?

54. In this case the defendant is charged with the willful, deliberate and premeditated killing of a person by a prisoner confined in a state or local correctional facility or while in the custody of an employee thereof. If he were found guilty of that charge beyond a reasonable doubt, do you believe that death is the only appropriate punishment?

55. Is that a view you hold strongly?

56. Would it be hard for someone to change your mind?

57. In the event a defendant is convicted of capital murder, i.e., a murder punishable by death or life in prison, and in the event it is proven beyond a reasonable doubt that the defendant's conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman in that it involved depravity of mind or an aggravated battery to the victim, do you believe that the only appropriate punishment for such a defendant is death?

58. In the event a defendant is convicted of capital murder, i.e., murder punishable by death or life in prison, and in the event it is proven beyond a reasonable doubt that there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing serious threat to society, do you believe that the only appropriate punishment for such a defendant is death?

IN THE CIRCUIT COURT OF
PRINCE WILLIAM COUNTY, VIRGINIA

(Caption Omitted in Printing)

EXCERPTS FROM PRE-TRIAL MOTIONS HEARING

[7] Mr. Mu'Min is asking today for a change of venire or a change of venue. If the change of venire is not granted then we would proceed with the change of venue.

My reasoning for both of the changes will be done as one thing rather than arguing both. And I do this in accordance with Rudd versus Commonwealth that says you have to do a change of venire first and then a change of venue second.

I am going to present the Court with some copies of publications up until the day this motion was filed.

We bring this motion sort of in a different time than most. Just to point out the uniqueness of this case.

Most criminal cases have publicity when the accused is arrested and that type of thing. And then they have another set of publicity further on down the road near the trial.

This case is unique in the fact that it's had publicity almost all throughout from the time of arrest on [8] through today.

We are averaging not quite one article a day in reference to this case. I mean obviously they don't come out one a day but when you take them in toto they come out to almost one article a day.

I'm going to be drawing the Court's attention to several of the articles.

THE COURT: Are most of those articles, I have just leafed through what you've given me, it appears most of them appear in the Potomac News.

MS. ROLLISON: Most of them are in the Potomac News, the Prince William Journal, the Weekly Messenger, the Washington Post.

THE COURT: The Prince William Journal is a paper that is throw away that is put in everybody's mailbox?

MS. ROLLISON: No, sir. That's a new newspaper that's come out. It's published, I believe, once a week.

THE COURT: It must be a throw away because I get one of them but I've never bought one.

MS. ROLLISON: I believe the Weekly Messenger is a pass out.

[9] THE COURT: All right.

MS. ROLLISON: In any case, most of the local papers including the Post that covers this local area. And by talking to Mr. Ryland, they are prepared to stipulate to enter these articles.

THE COURT: Any objection to these articles?

MR. EBERT: No, Your Honor.

THE COURT: The articles will come in toto as Defense Exhibit Number 1.

(The document referred to above was marked Defense Exhibit No. 1, for identification and was received in evidence.)

MS. ROLLISON: Taking all these articles individually you don't come up with much but taking them all together you come up with a pervasive feeling of the guilt of Mr. Mu'Min prior to his being found guilty by a jury.

There are several instances of "Mu'Min confesses" or "the defendant having confessed to this crime."

Well, the defendant has never confessed to this crime. He's merely made several statements to people, he's never confessed to kililng Mrs. Nopwasky.

I suggest that printing confessions or saying [10] that the defendant confessed is contrary to law and is a good reason for changing of venire or venue.

It prejudices a possible juror. They expect to hear that the defendant admitted all and in reality the defendant did not admit all. This is in accordance with Grodeau versus Louisiana, 373 US 723.

Several of the articles contain political opinions, it seems that this case came up when everybody was running for office and a lot of our local officials commented on this case in the paper.

And I direct the Court's attention to November 3, 1988, Potomac News opinion by David Brickley on whether inmates should be allowed to work in local areas.

Ms. Watts had a lot to say on this case on various occasions. 10/4/88 in the Potomac News, 10/5/88 in the Weekly Messenger and several other places.

Some of our elected officials, namely Stan Parris and David Brickley, when they were running for the congressional seat in this area issued statements concerning this case.

I think that was detrimental to the defendant. They have no way of knowing whether he is innocent or not. [11] They just presumed he was guilty and publicized their opinions about this case.

Marshall versus US at 360 US 310, 1959 says that "the prior record of an accused should not be released in the paper." Well, just about every article that I have handed the Court today contains a brief summary of Mr. Mu'Min's prior offenses, namely the murder that occurred in 1973.

I think this is also very prejudicial to him and is a good reason for change of venire or venue.

This case is unique in that it has changed a statewide policy. Governor Baliles through Vivian Watts changed the entire furlough program because of this case.

Since that occurred, and they took steps to—well, first of all they banned all prisoners on work crews and now recently I believe they are letting them go back to work in rural areas.

However, several bills have been introduced in the general assembly this year, one by David Brickley, asking to change some of the criteria that they use to set people out on work release crews. Solely because of the impetus of this case.

At this point in time I'm going to call [12] Officer Mike Wolverton to the stand.

THE COURT: Wait just a second.

That's in the way of an opening statement. Do you have anything you want to say, Mr. Ebert?

MR. EBERT: Yes, Your Honor. I don't necessarily, I guess, short of argument, proceed into evidence here, I guess.

THE COURT: It's in the way of an opening statement as far as I was concerned. She made quite a lengthy statement and then wants to call witnesses. I think it's incumbent upon me to let you have an opportunity to respond.

MR. EBERT: If it please the Court, I think there is no evidence before this Court, particularly in these articles that are any different than any other case that gets widespread publicity.

The Court of Appeals, the Supreme Court has consistently considered these capital murder cases. This issue is raised time and time again and unless there is a showing to the Court that there will be some prejudice to a jury and a fair and impartial jury cannot be selected, why the motion is not well taken. The burden being on the defendant to show that he or she cannot get a fair trial.

[13] The statements made about the so-called confession, to my way of thinking I'd call it a confession, but there's nothing in any of these articles I think that's not factual.

Counsel has alluded to political opinions, they are not necessarily talking about this case, this case may have been an impetus for someone to have a political opinion about it and just in policy but this is not the only case

that people mentioned in regard to the policy of the Department of Corrections in that regard.

So I don't think that that in any way prejudiced this man, he'd be tried on the merits of this case and the mere fact that this state may have a policy or not have a policy doesn't have any real bearing on him.

As a matter of fact, I'd say it would probably somewhat mitigate his circumstances if you're trying to shift the blame onto an agency or the government and away from an individual, to say that this crime was committed because of a policy of this state.

But in any event, there are a number of cases, there is the case which is Doctor versus Commonwealth, 227 Virginia, where articles kept coming right up to the day of trial, even the day of trial there were articles that [14] counsel kept saying were prejudicial and the Court there held "although the defendant's trial did attract certain attention from the press, the articles in the main were factual in nature and the voir dire revealed no bias or prejudice."

And it's within the sound discretion of the Court as to whether or not a change of venue or venire should be granted.

I would say at this point in time, Your Honor, there is no evidence before the Court that a fair and impartial jury can't be selected.

If at the time of trial it should appear that we could not impanel a jury, why then I'm sure the Court will take a different position. But at this stage I would ask the Court to deny the motion.

THE COURT: Ms. Rollison, regarding this motion, we just may be able to get a jury.

MS. ROLLISON: Your Honor, I agree with that. I was intending to ask the Court after I presented Mr. Wolverton on the stand, I have a specific reason in mind for calling him. Something that I wanted the Court to be aware of prior to trial.

THE COURT: All right.

[15] MS. ROLLISON: I was intending to ask you to withhold your ruling until we attempted to try to get a jury.

THE COURT: Then why do I need hear from Mr. Wolverton?

MS. ROLLISON: Pardon?

THE COURT: Then why do I need to hear some evidence? I mean, is he going to tell me something that I don't already know? For instance, that you haven't touched upon or is it something concerning a publication or what?

MS. ROLLISON: Yes. Basically, Mr. Wolverton will say that the Commonwealth attorney's office directed him to release Mr. Mu'Min's name on another alleged crime. And I was going to work that into an argument that it was prejudicial to him and they were inflaming the public. But that can wait to a later date. I have no problem with that.

THE COURT: Well, I don't want to cut you off but let me just point out to you that even capital cases, and I'm sitting here with the circuit court bench book on criminal procedure and kept up to date by the Supreme Court and it cites numerous cases dealing with the [16] question of voir dire of a jury.

Once you have learned from a jury in voir dire questioning that they have obtained some information concerning the case, from whatever sources, then you are obligated to ask questions, "Have any of you expressed or formed an opinion as to the guilt or innocence of the accused? And if there is an apparent affirmative indication then to ask the following questions. Considering what you've heard or read about the case do you believe that you can enter the jury box with an open mind and wait until the entire case is presented before reaching a fixed opinion or conclusion as to the guilt or innocence of the accused?"

And then it goes on. "Are you sensible of any bias or prejudice against the Commonwealth or the accused?"

In capital cases we have a specific set of questions to ask, "Do you have any opinion such as to prevent your convicting anyone of an offense punishable with death," et cetera, and right on down through it.

I think that's plenty of safeguards to protect the accused. But more importantly, the whole reason for a change of venue or change of the venire is in order to get [17] a fair and impartial jury. And it seems to me that it's incumbent on us to see if we can get a fair and impartial jury within this county or within this jurisdiction, that's two cities and the county.

I've heard it said that in this particular area in spite of the volume of papers that you can get a fair jury for most anything that you want to.

I know that occasionally they move people to this area to be tried from other locations but it appears to me that it would be premature rule upon this motion at this time when I think that it's incumbent upon us—unless time is of the essence and I ask both counsel this so that we have it on the record, is time of the essence insofar as the trial, the date of the trial and within the limited period of time the Commonwealth has to try it? Can we deal with that or can that be dealt with?

MS. ROLLISON: I believe so, Your Honor.

THE COURT: Mr. Ebert?

MR. EBERT: Yes, sir.

THE COURT: All right. Then I think your motion is entirely premature. We are going to try to get a jury in this jurisdiction, the 31st Judicial Circuit. And if we can't then the next thing would be to see if we [18] can't a get venire in and I will tell you right now the venire would probably be requested of Fauquier County because it would be outside of the 8th Congressional District in which Mr. Brickley and Mr. Stan Parris were candidates.

Fauquier is in the 7th District as is a part of Prince William County and the City of Manassas, I might add.

But it's my considered opinion that we can get a fair and impartial jury. And if we can't we will then ask

for venire from the next contiguous jurisdiction and proceed with that.

I'm not making that ruling at this time. I'm only deferring any ruling on this until after we have tried and that's being done with the express understanding that both counsel for the defense as well as the Commonwealth assure me that we will not run into problems insofar as limitations within which to try the case.

Any response by either one of you?

MS. ROLLISON: No, Your Honor.

* * * *

[15] MR. FAHY: Yes, sir. Beginning with the request that the jurors be examined individually and out of the presence of each other, in writing we indicate that we rely on the applicable provisions of the United States Constitution and in respect to this motion, as well as certainly the one about peremptory challenges and sequestering the Jury, we're not asking you to do anything that you are prohibited from doing.

I think that's the starting point with these things. It's not that we're asking the Court to violate a rule or a statute or even case law for that matter. I don't think the cases, while you may find—may find a case that says something doesn't have to be done—any such case law as that doesn't say you can't do something.

This Court, Your Honor, has disgression and we're not asking you to do something illegal or prohibited. We think in asking, for example, for individual questioning out of the presence of other Jurors, we are asking for something that is proper and really necessary to accord this man—and really the Commonwealth for that matter —a fully fair trial.

[16] We can talk about the publicity that's involved in this case; we can talk about the death penalty aspect of this case; and because of those pecularities, if you will, in this case, it's important that these people be questioned individually and out of each other's presence to avoid contamination, if you will, and to allow for the

selection of a truly impartial Jury in this case, and the selection of the Jury in this case is really a critical part in view of the penalty.

With reference to our request for additional peremptory challenges, really the same arguments apply.

We're not asking you to do something that you are prohibited from doing, I do not believe; rather, we are asking you to exercise your disgression to do something that would enhance the fairness of this trial and assure compliance with those constitutional provisions we're trying to comply with.

Really, all the same arguments apply to the next request to keeping this Jury together and keeping it from being contaminated as this trial goes on from one day to the next. I think the same arguments apply and we would ask you to grant that request.

* * * *

[25] THE COURT: All right, let me go down the list of them as you've got them there.

The motion to individually sequester and voir dire—provided for questioning the jurors individually—that motion is denied.

We have in the past been through four of these cases in this Court; three of them have reached the Supreme Court of Virginia, and at least one that I was involved in before went to the Supreme Court of the United States, and in every case, I believe, there has been something less than a single one.

As of this time, it's my intention to have a normal Jury panel in initially, but when we get to the more specific questions that are obviously going to have to be asked in this type of case concerning the publicity, then in order to prevent the contamination, so to speak, of the entire panel, at that time I will put all that we still have in separate rooms and then we will go with perhaps four.

And I say that, because I don't want jurors, [26] they're here as servants of the people, a duty that they

have no choice in, and to bring them into a courtroom where they are by themselves and the only person at which four attorneys are staring in the court, and a number of witnesses, not to mention other personnel, obviously puts those individuals in a position of where they may well feel that they're the ones that are on trial.

It's been accomplished in the past by going to two's and three's and I believe in one case at least they were in foursome's. It's my intention to go, as I said, with the full panel to get the basic stuff out of the way and then break them down and start out at least with panels of four and if I contaminate a panel of four, I should still have sufficient jurors.

If I don't, we'll just have to recess until the following day, and get the two additional panel members necessary —additional jurors necessary to go forth.

If it becomes noticeable that perhaps questions are contaminating a whole sub-panel, so to speak, then I'll perhaps reduce it to two, but I do not intend to go to a single member of the mannire to voir dire and for that reason, that motion is denied.

* * * *

[33] THE COURT: All right, let's look at the questions that the Commonwealth has proposed. Any problems with those, Mr. Fahy or Ms. Rollison?

MR. FAHY: I don't believe that we have any objections.

MS. ROLLISON: No, sir.

THE COURT: On the questions that the Defense is asking, let me say this to you, gentlemen. That I follow pretty close and I think I do most of the time what is published for the Court under the Circuit Court Judge's Bench Book for Criminal Trials.

And many of those questions which you have suggested that you will be asking will be covered. [34] Needless to say, there is no necessity for redundancy.

A juror is not on trial and so if they answer, and they're all going to be asked to take the oath first to an-

swer the voir dire questions, and then subsequent to that, the panel itself will be given an entirely different oath. But to the extent that there's redundancy herein, I am not going to permit it. You can tell as well as I what your redundancy might be, and when you consider that which the Court is obligated to ask.

Now, with that much in mind, I will say to you that there are some in here that I feel as though are just not appropriate, but I'm going to let the Commonwealth comment.

What is your response?

MR. EBERT: Judge, if you'd go through them.

THE COURT: All right, sir, we'll just go through them, one by one.

MR. EBERT: I assume number 1 would be covered.

THE COURT: Number 1's going to be covered by the Court, it always is. Not only that question, but whether or not anybody or any members of the family or any of the jurors or any member of their immediate family— [35] and I would define that as being brother, sister, mother, father, son, or daughter. We can go one step further, or in-laws—brother-in-law or sister-in-law.

Whether or not they are known to be socially acquainted with and knew of the victim, as well as counsel, as well as whether or not anybody of that relationship to the juror has employed either one of you as private counsel? Those same questions I always ask.

So, that takes care of 1, I see no reason for it, I'll cover it. If it's not covered however, Mr. Fahy, Ms. Rollison; if I don't cover it, why you're going to be privileged to cover it.

All right, number 2.

MR. EBERT: Two, I assume that would be covered.

THE COURT: That's the same thing—covered by the Court, it's required . . . or suggested by the manual and I, generally speaking, always do that. I even go one step further in this from what counsel has asked; I'll probably find out if it is a business, is it a corporation and do any of them own any stock in it?

So, I'm not going to permit that 2. It's going to be redundant if I did.

[36] Three?

MR. EBERT: I don't know whether that would be covered or not, Your Honor, by the Commonwealth, but I wouldn't have any objection to it if it's not covered.

THE COURT: I will have covered it.

MR. EBERT: Four—Has anyone patronized Dale City Florist? I don't know whether that's relevant.

THE COURT: Well, if it was Murphy's Five and Ten, you'd ask did anybody patronize it? We might eliminate the whole Prince William County.

How is that relevant, and don't forget, gentlemen, the purpose of the Jury.

MR. FAHY: Well, if I may respond, Your Honor.

THE COURT: All right, sir.

MR. FAHY: I would say it's pertinent both under rule 38:14, which provides in part that counsel has a right and may examine under oath any perspective juror and ask any questions relevant to his qualifications as an impartial juror.

I'm not saying necessarily everyone that has patronized the place is necessarily—by that fact alone made impartial, but it may lead to the exposure of a person who by reason of patronizing a place is impartial.

[37] And I might add, 8.01-358 provides for examination for areas laid out there, including whether someone is sensible of any bias or prejudice, and then we go on—

THE COURT: It's not worth arguing over. The question's very simple, "Has anyone patronized Dale City Florist?" If they have, we'd go to something else. The question is ultimately going to do, has the fact that you patronized them at one time or another, would that make any difference into the outcome of the case? Could you sit here and hear the law and the evidence and reach a fair and impartial verdict in spite of that?

MR. FAHY: I'm sorry, Your Honor, will we—

THE COURT: So, I will permit you to have that.

"Do any of you live within a mile of Ashdale Plaza?" I don't see any problem with that; I'm going to permit that.

MR. EBERT: I assume 6 will be covered.

THE COURT: Six is going to already have been covered by the question—in voir dire questions that I must ask provide, "Are any of you related by blood or marriage to attorneys, etc., etc. Are you friends, [38] clients, or former clients of the Defense attorneys or the Commonwealth's attorneys?" That's already going to be covered. So, I deny you.

"Anybody contribute to or participate in Mr. Ebert's campaign?" I don't have any objection to that; I'll let that be asked.

MR. EBERT: I have no objection to that and I don't have any objection to the next one.

THE COURT: All right, sir, 8 is passed.

MR. EBERT: Mr. Maybee, normally he assists counsel and I have no objection to that.

THE COURT: Well, he's part of the prosecutorial team and I'll permit that one.

THE COURT: All right. If witnesses are going to be called by the Commonwealth? I usually ask the question pertaining to the names that appear on the bottom of the indictment and beyond that, I don't know specifically who they are, but I see no particular reason to deny them asking the questions. We're just going to have to learn up front who the witnesses are and I presume maybe, vice versa.

Can you be specific on those in time by Monday?

[39] MR. FAHY: Yes, sir, we'll have a list.

THE COURT: Ten is all right. 10A, rather, is used all the time.

MR. EBERT: Your Honor, with 10B, I don't know that that's relevant in this case—the fact that someone might hold a job at the highway department.

The highway department, nor the Department of Corrections, is on trial in this case. The fact that someone worked there or didn't work there, I don't think is really relevant and I don't know that that question needs to be asked.

THE COURT: I'm going to permit that question to be asked about whether they worked for the highway department within Prince William County.

MR. FAHY: We would object to—maybe I can say this objection once in the event that there are further limitations, but basically we're relying on statute that I've already cited on the rule I've already cited, and also on the general federal constitutional provisions we've rereferred to repeatedly, namely Amendments 5, 8—I'm sorry, 5, 6, 8 and 14.

The essence of all this, of course, is getting a fair and impartial Jury and we submit that by statute, [40] rule, and constitution that we ought to be able to inquire into the background a little bit of these folks to make those decisions to get a fair and impartial Jury, and I would argue and submit to Your Honor—at least, note as an exception—that if it's pertinent that the person has some highway department connection within Prince William County, I don't see where a county line makes a whole lot of difference.

They could have a connection with the highway department in Lorton—

THE COURT: This event did happen in Prince William, didn't it?

MR. FAHY: It did happen in Prince William.

THE COURT: And the accusation is that it happened while he was in the custody of an employee thereof or while in the commission—in the custody of a correctional facility or in the custody of an employee thereof—while in the state or a local correctional facility and while in the custody of an employee thereof.

I'm presuming, because I know that the state correctional system can deputize, and that's my term—not in any statute or any rules or regulations, nor is it used

in rules and regulations—but they can train [41] highway employees or other employees for the purpose of custody while they're out on work release. I think it applicable there.

Let me just say, I'm not—I guess I did cut you off, so go ahead and finish it up.

MR. FAHY: Well, I pretty much said it, but we're talking about a question, "Do any of you hold jobs with the highway department or held jobs in the past or have family or friends that hold such jobs?"

If I understand the Court correctly, I don't think it makes any difference whether they held the job with the highway department in Prince William, or Fairfax County, or their son has a job with the highway shop in Fauquier—I don't think any of those county lines are going to make any difference in terms of potential bias, because of that connection with the highway department.

And I might add so far as the prison system goes, I know from previous experience that many people, or some people, in Prince William County that work for the D.C. prison system out of Lorton, and maybe other connections. I don't think those county and state lines have a whole lot to do with the potential that because they are an employee of a prison system—

[42] THE COURT: Show me the relevancy. That's the purpose of it. Show me the relevancy, where it is going to be relevant, because I've got to make the decision.

MR. FAHY: Well, I would ask these people these questions—

MR. EBERT: In the interest of time, I'll withdraw my objection to it.

THE COURT: All right. Well, I may have some problem with it. I'm not going to just let you go on. We're not going to start just asking irrelevant things, so what's the relevancy of it then in Prince William County at basically the time involved?

MR. FAHY: Well, hypothetically, let's say somebody says, "Yes, I'm an employee or my son is employee of the D.C. prison system, working out of Lorton."

THE COURT: Excuse me just a second. You all excuse me just a second and I'll be back, I've got to take this message.

The Court's in recess. Be at leisure, right here in the courtroom.

(Brief recess.)

THE COURT: All right, where were we, Mr. Fahy.

[43] MR. FAHY: Your Honor, I think I was making my argument in favor of 10B through 10G, using a hypothetical example.

There are people, I would submit, or potentially people who are employed, or let's say have a son who's employed by a highway shop in another county, and we would like to inquire about that and inquire whether because of that fact, if somebody answers that question affirmatively, maybe many of them will not, but inquire then whether that would have any effect on their ability to impartially decide this case?

I think, Your Honor, had indicated some limitation as to the county lines. We would suggest that—

THE COURT: Northern Virginia.

MR. FAHY: I think the prison system is a statewide system.

THE COURT: Well, there's no question about the prison. We're talking about the highway department.

MR. FAHY: Well, the highway department also, I believe, is a statewide system. It has local highway shops, but the potential for bias there doesn't respect county lines or any other geographical—

[44] THE COURT: We've already covered the question as to whether or not anyone's sensible to any bias or not anyone's sensible to any bias or prejudice against either the Commonwealth or the accused.

MR. FAHY: Well, Your Honor, I would submit, I think the rules and the statute and the case law back me up that—

THE COURT: Prove it. Show me the case law.

MR. FAHY: I would go so far as to say the Mackall case that was recently decided, where we were talking about—in that case, when it had questions about cashiers.

Now, the Court in that case recognized that some inquiry about cashiers was pertinent inquiry. It took exception with the number of questions, I believe, and thought maybe the issue had been covered by other questions, but the principle was recognized.

THE COURT: I just got through saying, it boils down to you want to know whether there's any bias or prejudice, and you cover that in one general question.

MR. FAHY: I don't think it can be covered in one general question.

THE COURT: Does the Commonwealth want to be heard on its?

[45] MR. EBERT: I think you can certainly cover it in one question. It looks like to me if you go through these questions, "Do you hold jobs, do you have any family or friends?"

You say do you or do you have family or friends—10E says "Do you hold jobs at the Department of Corrections?" and then the next question, "Do you have family or friends . . ." I think we can boil all those down, like to, "Do you or your family or friends hold jobs at the Department of Corrections?"

MR. FAHY: Maybe, I haven't made this point clear to Your Honor. The crime scene here—the allegation is that this Defendant left the Dale City Highway Shop and went to a nearby location where the alleged crimes were committed.

And then the other aspect of that is this Defendant is incarcerated at this time and at the time of the alleged offenses he was incarcerated, assigned to the Haymarket Field Prison, if you will, of our state prison system.

So, I'm asking about highway relationships, or highway department relationships, and prison relationships in view of that background. That's why we asked these [46] questions.

THE COURT: I ask you to limit your questions to asking in one question whether or not they, or members of their immediate family or any close friends, have ever been employed by the Department of Highways and Transportation or the Department of Corrections or a department of corrections? And then we'll go from there.

The chances are so slim that there would be very many to answer it. I guess it would take more time to argue these things now than to get the questions out of the way.

But you can consolidate 10D through G; you can consolidate all those by just adding the Department of Corrections, jails, prisons, or highway departments, and add friends, jurors, members of their immediate family, or any close friends.

All right?

MR. FAHY: Well, Your Honor, we would note our exception. We will abide by the Court's ruling and make that—

THE COURT: You're getting everything. Instead of being in six questions, which are redundant, you're combining them all into one question and getting a [47] response and then you can go from there.

MR. FAHY: I believe the Court has limited us to immediate family and close friends.

THE COURT: Well, the juror, members of their immediate family, or close friends.

Now, if you're trying to get friends—I mean, that's a long, long terminology. If you can show me how just friends—acquaintances or friends—

MR. FAHY: That's fine. To a certain extent we rely on—

THE COURT: Your exception's duly noted for the record. You've got to prove some relevancy to the questions.

All right, we go then to 11.

MR. EBERT: I don't have any objection. I think you and combine 11 and 12, "Do you now, or have you in the past, had a law enforcement job?"

THE COURT: Well, I thought that was already covered back here. Ten is the one.

MR. EBERT: Ten-A says, "Do you have any law enforcement officers as friends or neighbors?" You might be able to combine all three.

THE COURT: Eleven and 12 can easily be [48] combined as one, and should be combined as one, and permitted.

Thirteen?

MR. EBERT: I know that's covered, under that 10A.

THE COURT: You've got that in 10A, haven't you? Isn't that redundant?

MR. FAHY: Well, certainly—one says, "Do any of you have law enforcement officers as friends or neighbors?" and 13 says, "Do you any of you have family or friends—" We can certainly combine them in one, I'm sure.

THE COURT: Please do—10A and 13—permitted.

Fourteen is permitted.

MR. EBERT: Fifteen, I think is—

THE COURT: Fifteen's covered by a requirement of the Court.

MR. EBERT: Sixteen? Is that covered?

THE COURT: That's covered by a requirement of the Court.

Seventeen is covered by the Court.

Eighteen? Any objection to that?

[49] MR. EBERT: No objection.

THE COURT: It's proper; it will be granted.

"Have any of you served as jurors before?" That's proper.

This is a new Jury, so there will be some, but this is the first time this Jury's ever been called this term. This is a new Jury for the term, let's put it that way.

Twenty is all right.

MR. EBERT: I don't see where 21's relevant.

THE COURT: What's the relevancy of whether or not it's a foreman?

MR. FAHY: Well, Your Honor, remember we're getting at an impartial Jury. This information helps us in making intelligent strikes. It certainly doesn't embarrass any prospective juror; it doesn't—

THE COURT: It's not worth arguing over; I'm going to permit it.

MR. EBERT: If it please the Court, we're not here to make intelligent strikes; we're here to show bias or prejudice, and the fact someone's a foreman doesn't have anything to do with his bias or prejudice.

THE COURT: Your chances of getting that [50] question answered is probably one out of ten thousand or more. It can be asked and I can't imagine it embarrassing anyone, but nor can I imagine it's going to have any effect either way, but I see no reason why it shouldn't be asked. I'm going to permit it.

Twenty-two I am not going to permit. I can't imagine that anybody feels that they're entitled to a Jury of people who never knew each other or never spoke to each other and in essence, that's what you're saying.

MR. FAHY: Well, we note our exception, Your Honor.

THE COURT: State the reason why you think it's relevant.

MR. FAHY: Our thinking is this. We would want to know if somebody knows one another and if so, would their relationship before they came into this room be such that their opinion might be swayed by the other person—their ability to deliberate impartially. The fact of the matter is, this world's made up of leaders and followers and—

THE COURT: The question you ask is acquaintance. You didn't ask if they're close friends or something—acquaintance.

[51] MR. FAHY: Well, I'm simply asking whether they know each other and would that fact that they've known each other before they walked in this room have—affect their impartiality, insofar as their deliberation?

THE COURT: The answer is no.

"Have any of you been victims of a crime?" is correct. It's permitted.

"Family members been victims of a crime?—perfectly all right.

MR. EBERT: I think you can combine those two. "Have you or members of your family been victims of a crime?"

THE COURT: Can be and should be.

Twenty-five will be permitted.

I'm going to be covering 26, so it won't be necessary—it would be redundant.

I'll be covering 27.

Twenty-eight's permitted.

MR. EBERT: Objection to 29.

THE COURT: All right, I think he's entitled for the question to be asked. I don't know that it's in the right form.

There's a case on that that I dealt with [52] yesterday and it'll take me some time to find it, but he's entitled to that one.

MR. EBERT: I think he can ask the question, but the fact that one's white and one's black, will that have any bearing on it—the circumstances? But to go into, "in your heart of hearts and by your deliberations"—I mean, "your determinations."

THE COURT: Well, not only that, the next sentence, "She was found nude from the waist down." That's presupposing what the evidence will be, is it not? Do you want to tell them up front what the evidence's going to be?

MR. FAHY: Well, we do that all the time, don't we?

THE COURT: Well, we haven't got opening statements yet.

MR. FAHY: I have no doubt that there's going to be evidence that she was found partially disrobed, so I have no problem with that. Seems like many questions necessarily have as a predicate some statement about what the facts are. If the Commonwealth indicates that that's not going to be the fact, then maybe I do need to change it, but I believe that is a fact.

[53] And if I may, as to the pertinence of it, we do have an interracial matter and I think—let me say this then in support of this type of question.

In my experience, it's a difficult thing for jurors to concede in response to some of these questions that yes, something might affect their thinking. And that might be particularly true in the case of the racial area. But I would also suggest that that issue becomes even more sensitive in the area of when you combine a sexual component and a racial component.

In other words, there are many people, I would suggest, in this world who might think themselves pretty liberal about race matters, but if you juxtapose race and sex, they might have some biases that we need to be apprised of if it's going to affect their ability to make an impartial decision.

So, I'm simply suggesting that we have a white victim, a black Defendant, we have a body found partially nude, and I'm asking—I used the word "heart of hearts"—I don't really care about the language, but I'm trying to get these people to think way down.

THE COURT: Let's see what Mr. Ebert has to say about it.

[54] MR. EBERT: I think he can ask the question, "Does the fact that it involves a sexual connotation between a white and a black—the victim's white and the Defendant's black—would that have any effect on you?"

But to go on this question, really the form of it, I don't think is at all proper—heart of hearts isn't the language of the law and it's not the test, if anybody knows what the heart of hearts is.

The by due deliberation, he goes on and trys to determine . . . to define what their deliberations are. That's for the Court to do.

THE COURT: I'm going to ask you, Mr. Fahy, to strike out the words, "in your heart of hearts." Let's take out too, "She was found nude from the waist down. Do any of you believe that your deliberations might be affected by these facts?" I don't know what heart of hearts means.

MR. FAHY: Well, I'm not wedded to that language, Your Honor, but I do want to get these people to reflect.

THE COURT: You're entitled to ask the question on voir dire concerning bringing out their racial differences.

[55] MR. EBERT: There's no question about that, but when you start talking about "in your deliberations," we're getting off on something that's down the road.

We're trying to get their disposition at this point in time. If they have any feeling or prejudice or bias as they come to that jury box, because of a fact or circumstances that would affect their judgment.

THE COURT: We want to know that up front.

MR. EBERT: That's right and I think we can ask that question.

THE COURT: We can ask that question and if it's going to affect their deliberations down the road, we need to know it up front. The evidence itself might cause it to affect their deliberations, but I think it's a question that, striking that language I asked him to strike, would be appropriate, and I will permit that.

He is attempted—by your deliberations, he means to determine the Defendant's guilt or innocence—I don't think we need to go into that.

Last sentence where you define deliberations, I'm going to deny that portion of it, "and should you be called upon to deliberate in the sentencing stage."

So, what I'll permit is the question as it's [56] prepared, striking the words in sentence number four, "in your heart of hearts," and making a capital D—"Do, leave that as it is and at the end of the question, strike the remainder of that statement wherein you are stating what you mean by deliberations. Let them define what their deliberations are.

All right, it will be permitted in that fashion.

Question 30?

MR. EBERT: I have no objection. I assume the Defendant's a Muslim.

THE COURT: Well, I'm assuming that by the name, but that is the case by the nature of the question. Is that correct, Mr. Fahy?

MR. FAHY: We would ask to change Muslim to Islamic, after conferring with our client.

MR. EBERT: I have no objection.

THE COURT: That's appropriate and will be permitted.

MR. EBERT: I assume the Court would object to 31, but the following questions on that page, I would assume, would pretty much be covered by the Court.

THE COURT: I'm going to be covering that. [57] I'm not going to tell them what section of the code provides for it, but I'm going to be covering the question, "Have you acquired any information about this case and so forth and so on," as set forth in the statute?

Specifically, the rules 14A under Model Voir Dire Questions in the Judge's Handbook reads, "Have any of you acquired any information about the alleged offense or the accused from the news media or other sources, and if so, would that information affect the impartiality in this case?"

That's what I intend to ask and the rest of the question is whether what they know—we don't have to ask them to tell what they know—what they know, they have to answer the question, "Would it affect the impartiality of this case?" and that's what I'm going to permit.

MR. FAHY: Do I understand the Court to say that we're not permitted to ask them what it is they know about the case?

THE COURT: No, I'm not going to let you ask that. I'm going to ask the question whether or not what they know—regardless of what it might be—would that information affect your impartiality in this case.

[58] That's the question that's been approved by—as a matter of fact, this manual is approved by the Supreme Court and put together by Judges thereof, I presume.

MR. FAHY: Your Honor, we would note our exception—

THE COURT: Exception duly noted.

MR. FAHY: —on the authorities we've already cited.

THE COURT: I think 35 is appropriate. Thirty-one through 34's going to be covered by the Court, and your exception noted as to the reason why.

Thirty-five—"Have you discussed this case with anyone?" I think that's appropriate.

MR. EBERT: Thirty-eight, I object to, going into the substance of what was discussed. I think whatever it was, they can answer whether or not they formed an opinion.

THE COURT: Thirty-six and 37 are going to be permitted.

Thirty-eight will be denied for the same reasons I said back up on 31 through 34. The question—if they've discussed—an appropriate question would be, [59] "Would what you discussed in any way affect your impartiality in this case?" I'll permit you to ask that.

"Have you discussed this case with anyone? With whom, when and where?" "Would what you have discussed affect your impartiality in this case?"

I'll let you ask that one, but I'm not going to let you ask what did you discuss. All right?

MR. FAHY: We would note our exception again.

THE COURT: All right.

"Have you formed an opinion or conclusion of this case?"

MR. EBERT: I have no objection to that. Court will probably ask that, won't you?

THE COURT: I would already have covered it. My question, "Have any of you expressed or formed any opinion as to the guilt or innocence of the accused?"

Just for your edification, gentlemen and lady, if there's an apparent affirmative indication, then the following questions are asked.

"Considering what you've heard or read about the case, do you believe that you could enter the jury box with an open mind, wait until the entire case is presented before reaching a fixed opinion or conclusion as to the [60] guilt or innocence of the accused?" That's the language I would use.

So, your 39's going to be covered by the Court.

MR. EBERT: If that's the case, then so will 40.

THE COURT: And 40 will be covered by the Court.

MR. EBERT: I think, Your Honor, 41 and 42 is included in 35—"Have you discussed this case with anyone?" It's the same thing as, "Has anyone expressed an opinion about this case to you?"

THE COURT: That's redundant, is it not, Mr. Fahy?

MR. FAHY: I don't think any of this is redundant, Your Honor.

THE COURT: Well, you haven't looked at it yet, have you?

MR. FAHY: Oh, yes, sir.

THE COURT: All right. Well, look at 35. "Have you discussed this case with anyone?"

Forty-one, "Has anyone expressed an opinion about this case to you?" What's the difference?

[61] MR. FAHY: I think there's a difference where someone has—there can be a discussion or someone can overheard something without somebody expressing an opinion.

THE COURT: Then why do you ask 42 then? "Who, what, when, where?"

MR. FAHY: Yeah, I think there's a difference—

THE COURT: The answer's no, your exception is duly noted for the record. I'm not going to listen to anymore argument on it.

All right, 43?

MR. EBERT: I'm going to object to that. I think the question to be asked on the death penalty is whether or not they can consider death or life under the appropriate circumstance. I think this very question came up in the Mackall case. What their opinion is—either for or against the death penalty—really their personal opinion isn't really relevant.

It's whether or not they could impose the death penalty or life penalty under the proper circumstances, and for that reason I'll object to that question and particularly the following question, when you get down to how strong is it, how long have you held it? [62] I don't think that's at all relevant.

In fact, the whole question is not what the law requires. Under *Wainwright vs. Witt*, and cases along that line, the test is whether or not the Jury can consider both aspects of a potential punishment.

THE COURT: Mr. Fahy.

MR. FAHY: Your Honor, some of these questions, namely 43 and 44 and I think 47, were asked in Mackall. In that opinion of the Virginia Supreme Court, I think they ruled that it was not error for the trial court to refuse to permit those questions; however, I still think those questions—

THE COURT: Then they weren't asked, were they?

MR. FAHY: Pardon me?

THE COURT: They weren't asked at this time.

MR. FAHY: We requested to ask those questions.

THE COURT: And the Court denied them.

MR. FAHY: That's correct.

THE COURT: And the Supreme Court upheld them?

MR. FAHY: The Supreme Court ruled that it was not error on the part of the trial court to do that, and

[63] if I may, I would simply suggest that with all due respect to the Virginia Supreme Court, that they're not the final word on some of these constitutional arguments and we ask to ask these questions in light of the federal constitutional provisions, in particular that that would authorize this Defendant an impartial Jury.

We think it is appropriate under *Wainwright v. Witt* to ask questions like this, because the test here in this death penalty area is whether a person's opinion would impair, or significantly impair or substantially impair—I forget . . . I could find that language for you—but in any event, it's a relative sort of thing, if you will.

And in order to find out whether someone's ability to decide impartially is impaired, you have to ask questions to find out how strong their views are, how long they've held them, what they are for that matter, and you can't get that sort of information with a sort of a five-second, yes and no interrogation as to whether they're going to follow the instructions of the Court.

I know these questions take more of the Court's time, but I think the goal here in a death penalty case—to get an impartial Jury—the significance of [64] that makes the length of time it might take us to ask these addition questions immaterial or of little significance.

I think they're constitutionally warranted, federalwise anyway, not withstanding what the Virginia Supreme Court has ruled, and I don't think the Virginia Supreme Court said you couldn't allow these questions. It just said it was not error on the trial court not to permit them, which I would take to mean in Your Honor's case that you're not prohibited from allowing us to ask these questions in this case.

THE COURT: The Court starts out by saying that the trial court has great disgression in these, does it not?

MR. FAHY: Yes, sir.

THE COURT: Where do you end up? The real question is whether or not they can follow the mandate of their oath that they're going to be required to take. That

is, to try the case based upon the law and the evidence and follow the dictates of the law and evidence, whether they like it or not. Isn't that it basically?

MR. FAHY: I think the ultimate question is that which is posed by *Wainwright v. Witt*, which says in [65] effect if their opinion with respect to the death penalty significantly impairs their ability to impartially decide the case. That's the bottom line, and these questions are designed—

THE COURT: Ask that up front.

MR. FAHY: These questions address that issue.

THE COURT: We ask that question up front. I think the questions are covered by the Court. I think the question boils down to whether or not they—and as to their view about capital punishment, I don't think you or I are entitled to know specifically what each juror's view might be.

The think that we are entitled to know is, is their view so strong or such that they cannot take an oath to follow the Court's instructions and the evidence of the case?

Now, if the Court's instruction is that capital punishment is a possibility and they would have to breach their oath, then it's irrelevant and they could not, of course, accept. But as far as learning what their opinion or view is and how long they've held it and how strong they've held it, it's not appropriate and the Court will not permit it.

[66] Forty-three, 44, 45, and 46 are refused.

Forty-seven?

MR. EBERT: I think that's the same thing, Your Honor. It relates back to the other question, "Would your opinion and views favor"—assuming they favor it; they might oppose it—"have any affect on your choice between life and death, imprisonment, punishment in the appropriate case?"

They've already said they could consider the law and the evidence and consider both aspects of an appropriate punishment.

THE COURT: Do you want to be heard anymore on 47?

MR. FAHY: Your Honor, as originally drafted, 47 was a follow-up to 43 through 46. We take exception with the Court's denying them, but I can see that it was written as a follow-up to those questions.

THE COURT: Forty-seven's denied. Forty-eight's denied—I mean, 47A's denied—"What does a life sentence mean to you?" That's denied.

Forty-seven B?

MR. EBERT: I object to that.

MR. FAHY: Your Honor, may I just state for [67] the record very briefly on 47A?

THE COURT: All right.

MR. FAHY: We think it's appropriate to know, if I'm not mistaken, it would be appropriate for the Court to instruct the Jury that they're not to consider what might happen afterwards and I suppose our system is set up with these instructions in mind with the idea that the Jury is not going to think about parole and that sort of thing. That's not the facts. The reality is different.

We have a group of people that walk in off the street and they know a little bit more than the system suggests they do. So I think this is an appropriate question.

What are these people thinking about life imprisonment? If they think the guy's going to walk out in seven years or something, I think it's appropriate for us to know about that when we select the Jury.

THE COURT: Well, I'm not in the position to ask you questions, but suppose you ask them, "What do you think seven years means?"—I use your figure, seven years.

MR. FAHY: I don't know that I would—

THE COURT: Well, where are you going to stop? [68] The answer is, you don't ask them. They've got to follow the instructions of the Court and if the Court instructs that you're entitled to the death penalty or life imprisonment, then life means what is common language,

what common usage of the English language is. I'm denying your 47A.

Forty-seven B?

MR. EBERT: I object to that. That kind of sets the standard as to ask whether or not mercy should have nothing to do with the law. That isn't a proper question.

THE COURT: Do you want to argue 47B, Mr. Fahy?

MR. FAHY: Yes, sir. As I recall the statutes, the Commonwealth, of course, has to prove him guilty of the capital murder felony. They also have to prove one of the aggravated circumstances and then even then, the Jury doesn't have to impose the death penalty. So, I think that question is appropriate.

If a person is going to make that punishment decision on the facts of the murder itself and not be willing to follow the statutes as I've suggested they are written, then they ought not to be on that Jury. I think [69] it's a fair question.

THE COURT: Forty-seven B is denied.

Forty-seven C?

MR. EBERT: The Court's going to instruct them, I would assume, on what they're to consider, because they're going to have to consider whatever evidence they get at that time, but I don't know whether they're going to get—I don't know what's going to be considered history or special circumstances or what else. I think that the Court is going to certainly instruct them as to what they should consider in making that decision.

THE COURT: Anything you wish to say about it, Mr. Fahy?

MR. FAHY: Your Honor, again, I think it's designed to find out whether these people are going to follow the law and—

THE COURT: They're going to tell us whether or not they can follow the law. If they can't follow the law, we're going to strike them for cause.

MR. FAHY: Well, I would submit this question is a legitimate one designed to find out whether they will consider other things that by law may be considered.

THE COURT: For the reasons previously stated, [70] it's denied.

Forty-seven?

MR. EBERT: If it please the Court, I'm going to object to that. The people charged with his supervision are not on trial and it doesn't make any difference whether they're negligent or otherwise. That has nothing to do with whether or not he committed the crime.

In fact, we can stipulate if he'd been in shackles or someplace else, he perhaps could not have committed the crime, but that's not relevant, that's not the issue before the Jury.

If in fact he did commit it, and if in fact had he been someplace else, he couldn't have committed it, isn't relevant in this case.

THE COURT: Mr. Fahy.

MR. FAHY: It may not be relevant at guilt phase, but it's certainly relevant at sentencing and if these jurors would not consider that, then they ought not to be sitting. I think that's an appropriate question.

THE COURT: That question is denied.

Forty-eight?

MR. EBERT: All these other questions, Your [71] Honor, will be covered in the Court's instructions. They're going to have to consider, they're going to have to say under oath whether or not they can consider death and life equally under the facts and circumstances, and to go through this I think is really redundant, particularly when you get into, "Do you hold your view strongly? Would it be hard for somebody to change your mind?" That's not a proper question to ask a juror.

THE COURT: All right, Mr. Fahy.

MR. FAHY: Again, we do have a series of questions. Forty-eight, 51, and 54 and then again, really 57 and 58 are death penalty questions that are specific to this case.

In other words, we have an indictment that advances three different theories of capital murder and I don't believe the Court's questions will be as specific to the different theories that these questions would be.

It is not sufficient, I would submit, in order to get an impartial Jury to talk in generalities. We need to specify in this we're talking about capital murder and the commission of a robbery, or capital murder and the commission of rape. These different circumstances might affect the ability of different jurors to deliberate [72] impartially.

And then, 57 and 58 just go into the aggravated circumstances provisions and again, they make the death penalty questions more specific, more meaningful and therefore allow us to arrive at an impartial Jury.

And I would submit they're all appropriate, and in the absence of specific questions specific to this case coming from another source such as the Court, then I think these are very much appropriate.

THE COURT: All right, 48 through 56 is denied. The Court's going to instruct as to the law and as to what can be the punishment for someone charged with and found guilty of any one of the three different elements of the capital case that he's charged with.

And then the question's going to be asked, more than once from the looks of these things, as to whether or not they can follow the Court's instructions and reach a fair and impartial verdict based upon that, irrespective or irregardless or what their personal views might be.

The legislature's made the decision that death is an appropriate penalty under certain circumstances, three of which happen to be the ones being charged here.

[73] So, the question is, can they follow the law as instructed by the Court and if they can't, then they'll be struck for cause. If they can, why then I believe them to be appropriate jurors.

Forty through 56 is denied.

MR. FAHY: Your Honor, I've already made my comments in support of 57 and 58. They are similar to the questions you've already ruled on, except they then tack on reference to the aggravating circumstances and I would just reiterate my argument that I've already made.

THE COURT: All right, Mr. Ebert.

MR. EBERT: If it please the Court, I think this goes along with the same line of the other cases. The Court's going to tell the Jury what the law is and they're going to have to say under oath that they can consider the law and they can impose either of the two alternatives, in the event they get to that stage.

I think this is, again, inappropriate at this stage. We don't even know what the Court's going to instruct. You may not instruct as to all these elements set forth in 57 and 58.

THE COURT: All right, that covers them all, because I deny those two.

[74] MR. FAHY: Yes, sir, and Your Honor, I just wanted to—I haven't jumped up and down every time, but I want to note for the record that we do take exception with the various denials that the Court has made.

I think I've got in the record our position with respect to those denials, but I would reiterate it. It's based on the rule that we've made reference to. I know that's in the record, and the statute, which is 8.01-358, *Wainwright v. Witt*, which we have cited, and the constitutional provisions being the fifth, sixth, eighth, and fourteenth amendments. And it can't hurt, I'll mention Article I, Section 8 of the Virginia Constitution. I think that's the proper reference.

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IN THE CIRCUIT COURT
OF PRINCE WILLIAM, VIRGINIA

(Caption Omitted in Printing)

EXCERPTS FROM VOIR DIRE

[9] With that much introduction and that much having been said to you, I would ask you are any of you or any members of your immediate family related by blood or marriage to the accused, Mr. Mu'Min?

Incidentally, I should perhaps tell you that his name is also—was before he had it legally changed, was Mr. David Michael Allen.

Are any of you or members of your immediate family related by blood or marriage to Mr. Mu'Min?

THE JURY PANEL: (No response.)

THE COURT: Or to Ms. Nopwasky?

THE JURY PANEL: (No response.)

THE COURT: This is alleged to have taken place at Dale City Carpet I believe is the name of that. Is that correct?

MR. EBERT: It's Dale City Floors.

THE COURT: I beg your pardon?

MR. EBERT: Dale City Floors.

THE COURT: Dale City Floors in the Ashdale Plaza Shopping Center.

Have any of you or any members of your immediate family ever been employees of that operation?

[10] THE JURY PANEL: (No response.)

THE COURT: Are you stockholders?

THE JURY PANEL: (No response.)

THE COURT: Are you knowledgeable or have a friendly relationship with anyone that worked in that store?

MS. SANTIAGO: (Indicating.)

THE COURT: For the time being, I'm just going to ask you to answer the questions yes or no.

Because of the nature of this case, we perhaps will—well, there's no doubt about it, we're going to have to take the Jury out as a group and bring you back in smaller numbers so as to question you more specifically.

But counsel will be making a record of that.

MR. FAHY: Your Honor, may I just ask them to say their name if they're answering affirmatively to something?

THE COURT: I wish we had numbers, but under the circumstances we'll have to ask you your name, please.

The lady, the person who answered that, your name, please, ma'am.

MS. SANTIAGO: Alexandria Santiago.

THE COURT: Ms. Santiago.

[11] Anyone else?

MS. DEIOTTE: (Indicating.)

THE COURT: Ms. Deiotte.

Are any of you friends, or clients, or former clients of either Mr. Paul Ebert, Mr. William Ryland, Ms. Lawrie Rollison, or Mr. Ronald Fahy?

MS. DEIOTTE: (Indicating.)

THE COURT: Excuse me.

MS. DEIOTTE: Donna Deiotte.

THE COURT: Ms. Deiotte.

Any members of your immediate family that you are aware of that have ever been clients of any of those four attorneys?

Yes, ma'am. Your name, please.

MS. HAINES: Mrs. Haines.

THE COURT: I can ask both Ms. Deiotte and Ms. Haines at this time, would the fact that you have been a client of or members of your immediate family may have been clients of any one of those attorneys, would that have any effect upon you in this case?

In other words, could you sit here and hear the law and the evidence, the law being that which I tell you is

the law, the evidence will be that which you hear [12] from the mouths of the witnesses on the witness stand, and reach a fair and impartial verdict based upon the law and the evidence without regard to the fact that you had a close relationship as attorney-client with one of those attorneys?

Is there anyone that could not do that?

MS. DEIOTTE: I've also been a witness for the Commonwealth.

THE COURT: We'll get to that a little bit later on, Ms. Deiotte.

She's been a witness for the Commonwealth.

The fact that you've been a witness for the Commonwealth, does that cause you any problems?

Can you reach a fair and impartial verdict based upon the evidence in this case and the law that I tell you is the law, without regard to the fact that you've been a Commonwealth witness in the past?

MS. DEIOTTE: I don't know.

THE COURT: We'll give you some more time to think about that, and we'll call you back later on under the circumstances.

Do any of you have any interest in the outcome of the case?

[13] THE JURY PANEL: (No response.)

THE COURT: Are any of you sensible to any bias or prejudice against either the Commonwealth or the accused?

THE JURY PANEL: (No response.)

THE COURT: This is a case in which a Jury may have to consider punishment in a capital murder. It involves capital punishment.

Do any of you have an opinion such as to prevent you from convicting anyone of an offense punishable by death?

And I'll ask if there is such an answer, for you to let it be yes and nothing more.

Does anyone have such a religious or otherwise conviction?

THE JURORS: (Indicating.)

THE COURT: The answer is yes for the two of you. The name of the gentleman, sir?

MS. SUTER: William Suter.

THE COURT: And?

MS. FELMLEY: Martha Felmley.

THE COURT: And Mrs. Felmley.

MR. FAHY: I'm sorry. Her last name, please.

[14] THE COURT: Felmley.

MR. EBERT: Felmley.

MS. FELMLEY: Felmley.

MR. FAHY: Thank you.

THE COURT: Is there any Juror who could never impose the death penalty or who would refuse even to consider its imposition in this case?

THE JURY PANEL: (No response.)

THE COURT: Is there anyone who could never impose the death penalty, or who would refuse to even consider its imposition in the case if the evidence justified and he was found guilty beyond a reasonable doubt of the crime?

THE JURY PANEL: (No response.)

THE COURT: If you were to sit as a Juror in this case and the Jury were to convict the Defendant of capital murder, would you be able to consider voting for a sentence less than death?

Is there anyone that would not be able to consider one if he was convinced beyond a reasonable doubt that the charge had been proven—is there anyone who could not consider a sentence of less than death—in other words, life imprisonment?

[15] THE JURY PANEL: (No response.)

THE COURT: Is there anyone on the Jury Panel who cannot accept the rule of law that one is innocent until proven guilty beyond a reasonable doubt?

THE JURY PANEL: (No response.)

THE COURT: Is there anyone who cannot accept the rule of law that the Commonwealth must prove the Defendant's guilt beyond a reasonable doubt?

THE JURY PANEL: (No response.)

THE COURT: I should say, is there anyone that could not accept the premise that a person is innocent until proven guilty beyond a reasonable doubt even though he or she has been—in this case he has been indicted and is on trial?

In other words, the fact that he's been indicted and is on trial cannot be considered by you. He is presumed to be innocent at this point.

Is there anyone that cannot accept that?

THE JURY PANEL: (No response.)

THE COURT: Is there anyone that does not understand that a Defendant does not have to produce any evidence in defense of his case?

THE JURY PANEL: (No response.)

[16] THE COURT: Have any of you acquired any information about the offense, the alleged offense, or the accused from the news media or from any other source?

Is there anyone who has acquired any information from the news media or from any other source?

THE JURORS: (Indicating.)

THE COURT: All right. There are a number of hands. Let's start over in the corner in the way in which they were called out.

The first gentleman, sir?

MR. MERRITT: Fred Merritt.

MR. BOOTHE: Carrington Boothe.

THE COURT: Carrington Boothe, and then on down the line.

MR. RUNION: Mr. Runion.

MR. FAHY: I'm sorry?

THE COURT: Al Runion, Mr. Runion.

MR. LAYTON: Mike Layton.

THE COURT: Mr. Layton, and next?

MS. WALTERS: Sheila Walters.

THE COURT: Sheila Walters.

And the gentleman in the corner.

MR. TAYLOR: Taylor.

[17] THE COURT: Mr. Taylor, and which direction did we come from? Back up here. The lady in blue.

MS. HAINES: Mrs. Haines.

THE COURT: Mrs. Haines. Sir.

MR. SYPHRETT: Dennis Syphrett.

THE COURT: Mr. Syphrett.

MR. SUTER: William Suter.

THE COURT: Mr. Suter.

MS. WOLFE: Rita Wolfe.

THE COURT: Ms. Wolfe.

MS. THORPE: Evelyn Thorpe.

THE COURT: Mrs. Phillips; is it?

MS. THORPE: Thorpe.

THE COURT: Thorpe, I'm sorry.

MS. FOREHAND: Ms. Forehand.

THE COURT: Ms. Forehand, and anyone else down the line?

All right the first lady here, the one with the blue suit on. Your name again.

MS. FELMLEY: Martha Felmley.

THE COURT: Ms. Felmley.

MS. DAME: Sandra Dame.

THE COURT: Ms. Dame.

[18] MS. DEIOTTE: Donna Deiotte.

THE COURT: And Ms. Deiotte.

MR. FAHY: I'm sorry. I think one of the ladies in the front row.

THE COURT: The first lady.

MS. DILLON: Cheryl Dillon.

THE COURT: Ms. Dillon.

MR. FAHY: And I missed the name after Ms. Felmley, I think.

MS. DAME: Sandra Dame.

MR. FAHY: Dame, thank you.

THE COURT: A follow up question on that.

Would the information that you heard, received, or read from whatever source, would that information affect your impartiality in this case?

Is there anyone that would say what you've read, seen, heard, or whatever information you may have acquired from whatever the source would affect your impartiality so that you could not be impartial?

MR. SYPHRETT: (Indicating.)

THE COURT: Your name, sir?

MR. SYPHRETT: Dennis Syphrett.

THE COURT: Mr. Syphrett.

[19] Have any of you expressed or formed an opinion of the innocence or guilt of the accused?

Is there any person who has already formed an opinion as to the innocence or guilt of the accused?

THE JURY PANEL: (No response.)

THE COURT: Considering what the ladies and gentlemen who have answered in the affirmative have heard or read about this case, do you believe that you can enter the Jury box with an open mind and await until the entire case is presented before reaching a fixed opinion or conclusion as to the guilt or innocence of the accused?

Is there anyone who could not do that?

THE JURY PANEL: (No response.)

THE COURT: I'll repeat it in a different fashion.

In view of everything that you've seen, heard, or read, or any information from whatever source that you've acquired about this case, is there anyone who believes that you could not become a Juror, enter the Jury box with an open mind, and wait until the entire case is presented before reaching a fixed opinion or a conclusion as to the guilt or innocence of the accused?

MR. SYPHRETT: (Indicating.)

[20] THE COURT: Yes, sir.

MR. SYPHRETT: Dennis Syphrett.

THE COURT: And you feel that you could not, sir?

MR. SYPHRETT: It would have to take an awful lot to change my mind.

THE COURT: So you've formulated an opinion already, sir?

MR. SYPHRETT: Pretty strong.

THE COURT: Does either party have any further questions to ask him at this time?

MR. EBERT: May I ask a question, Your Honor.

THE COURT: Commonwealth first.

MR. EBERT: Mr. Syphrett, could you put that aside, your personal feelings, and judge this case solely on the law and merits as the Court has explained to you?

MR. SYPHRETT: Like I say, it would take quite a bit to convince me otherwise.

THE COURT: I'm sorry. I'm not going to let any more questions be asked.

MR. EBERT: I'd say perhaps he should be released.

THE COURT: Mr.—

[21] MR. SYPHRETT: Syphrett.

THE COURT: Sir, I'm going to have to excuse you. Thank you very much for your attendance here.

I would ask you to step down, and I'll ask my Clerk to call the next person to fill your void.

MR. SYPHRETT: Thank you.

THE COURT: You may go down the hall if you like, right out that door, and you're excused. You do not have to go back in the Jury room.

All right. The next Juror.

THE CLERK: Paul Tsou.

(Whereupon, Mr. Tsou was sworn by the Clerk of the Court.)

THE COURT: Come and have a seat in the Jury box, sir, at this end. I think it would be closer.

His name for the attorneys, again.

THE CLERK: Paul Tsou.

MR. TSOU: Tsou.

THE CLERK: Tsou, T-S-O-U.

THE COURT: Has everybody got it?

MR. FAHY: Yes, sir.

THE COURT: Mr. Tsou, I'm sure you've heard the questions I've asked of you, and you've been sworn now [22] as a panel member. But I must for the record repeat these questions.

Are you, or do you know of any members of your immediate family that may be related by blood or marriage to either the accused or the victim in this offense, Ms. Gladys Keene Nopwasky? Am I saying that correctly?

MR. EBERT: Nopwasky.

MS. ROLLISON: Nopwasky.

THE COURT: You or members of your immediate family?

MR. TSOU: (Shaking head.)

Are you related by blood or marriage, or any members of your immediate family who may be related by blood or marriage to any of the attorneys involved?

MR. TSOU: No.

THE COURT: Are you a stockholder, or have you ever been an employee or had any interest at all in the Dale City Floors business in Ashdale Plaza?

MR. TSOU: (Shaking head.)

THE COURT: Are you a friend, client, or have you previously been a friend or client of either the Commonwealth's Attorney, or Mr. Ryland, or either one of [23] the Defense counsels, Ms. Rollison or Mr. Fahy?

MR. TSOU: I don't believe so.

THE COURT: Do you have any interest in the outcome of the case?

MR. TSOU: No.

THE COURT: Are you sensible of any bias or prejudice against either the Commonwealth or the accused?

MR. TSOU: (Shaking head.)

THE COURT: This case is one involving capital punishment. The Jury may have to consider capital punishment.

Do you have any opinion such as to prevent your convicting anyone of the offense punishable with death?

MR. TSOU: (Shaking head.)

THE COURT: Could you never vote to impose a death penalty, or would you refuse to even consider the imposition of the death penalty in the event that the law and the evidence justified it?

MR. TSOU: (Shaking head.)

THE COURT: Would you refuse to impose the death penalty in other words if the law and the evidence justified it?

[24] MR. TSOU: (Shaking head.)

THE COURT: If you were sitting as a Juror in this case and the Defendant is convicted of capital murder, could you consider voting for a sentence of less than the death penalty, in other words, life imprisonment?

MR. TSOU: Yes, I—

MR. FAHY: Your Honor, I believe the Jury member was saying something. I could see his lips moving but I didn't hear what he had to say.

THE COURT: He said yes. Let's get your answer, sir.

In the event the Defendant was convicted of capital murder, could you consider voting for a sentence of less than death? The answer is?

MR. TSOU: Yes.

THE COURT: Are you able to accept the premise of law that a person is innocent until proven guilty, even though he has been indicted and is standing trial here today?

MR. TSOU: Yes.

THE COURT: Are you also willing to accept the law that the Commonwealth must prove the Defendant guilty beyond a reasonable doubt?

[25] MR. TSOU: (Nodding head.)

THE COURT: And the Defendant does not have to produce any evidence in his own behalf at all. Can you accept that premise?

MR. TSOU: (Nodding head.)

THE COURT: Have you acquired any information about the alleged offense or the accused from the news media or from any source whatsoever?

MR. TSOU: No. I talked to somebody this last Sunday who said there was a murder trial or something on.

THE COURT: Is that the only information?

MR. TSOU: Yes.

THE COURT: Would the information you have acquired affect your impartiality in this case?

MR. TSOU: No.

THE COURT: Have you expressed or formed an opinion of your own as to the guilt or innocence of the accused?

MR. TSOU: (Shaking head.)

THE COURT: Considering what you heard, or read, or what you've just spoken of, can you take a seat in the Jury box with an open mind and wait until the entire case has been presented, and reach a fixed opinion [26] or conclusion as to the guilt or innocence of the accused based upon the law and the evidence?

MR. TSOU: Yes. I believe I can.

THE COURT: Is there anyone who knows of any reason whatsoever why you should not sit here and be a Juror on this panel today?

THE JURY PANEL: (No response.)

THE COURT: Let me say at this point that it is anticipated this case may go for as much as the remainder of this week, several days.

Does that create any undue hardship, unreasonable hardship upon any individual?

JURORS: (Indicating).

The gentleman back here first. Your name, sir?

MR. DAILEY: Gregory Dailey.

THE COURT: Mr. Dailey and Ms. Deiotte.

Mr. Dailey, is that because of some prior commitments, or what is the hardship?

MR. DAILEY: Because of the work I'm into. I'm doing telephone communications, and the company that I work for is very small and it would jeopardize their business right now. I'm trying to work on the business—

[27] THE COURT: That company will never be a party to a litigation like this I'm sure, but at the same time they may be involved in cases in which they need Jurors.

And under the circumstances that would have to be something that we would not be able to excuse you from.

MR. DAILEY: I understand.

THE COURT: Anyone else? Now, Ms. Deiotte.

MS. DEIOTTE: I have a two person business, which is a newspaper. The newspaper is due to go to the printer on Thursday.

My other person just had a baby two weeks ago, so she's not working. I have somebody part time in the office and that's it.

If I had to serve all week I couldn't get my paper out, and I'm the sole support of my family.

It really will create a hardship if I have to serve all week.

THE COURT: Ms. Deiotte, you've been around the Courtroom for a long time. I suspect that you know what the answer is to that question.

MS. DEIOTTE: (Nodding head.)

THE COURT: She nods in the affirmative, but you must know—

[28] MS. DEIOTTE: Well, I do think it's a freedom of press issue, also.

THE COURT: Well, it may well be, but I take an oath to uphold the laws of the Constitution of the United States and the laws of Virginia.

As you well know, they have really restricted us as to who is to be exempt from it nowadays.

This case is that important, and under the circumstances I would have to deny you.

We have given you an opportunity to say so, both of you, but as you all know, eventually this Jury panel is going to be brought down to fourteen, and I have twenty-six in there now.

So you can figure out that there are some people who are going to have to leave by the usual method of strikes.

And I will tell you that that's going to take place as soon as we get our fair and impartial panel.

Is there anyone else who would find any hardship in that regard?

THE JURY PANEL: (No response.)

THE COURT: I will also tell you that I plan to run hopefully from 9:30 in the mornings until [29] approximately 5:00 o'clock, depending on a good convenient time to break at that time of the evening.

Does that cause you any problem?

And I will say to you up front that we do give you an opportunity late in the evening if it does appear that there's going to be some additional time or run over to make appropriate telephone calls during the course of the recess.

THE JURY PANEL: (No response.)

THE COURT: Is there anyone of you who has any hearing impairment?

THE JURY PANEL: (No response.)

THE COURT: Is there anyone who does not understand the English language?

THE JURY PANEL: (No response.)

THE COURT: One further question from me, and it's a repeat.

Is there anyone who for any reason whatsoever, other than those that have been stated, why they should not sit here and be a Juror on this Jury today should you be one that was selected by virtue of the fact that you were not eliminated?

THE JURY PANEL: (No response.)

[30] THE COURT: Does the Commonwealth Attorney's office have any questions?

MR. EBERT: Your Honor, two members of the Panel indicated that they could not impose the death penalty.

I think as a matter of law they ought to be excused and someone take their place, Ms. Felmley and I think Mr.—

THE COURT: They haven't said—in answer to my follow up questions they didn't say that they could not. We'll have to bring them back in.

MR. EBERT: If that's the case, I just have a few questions.

THE COURT: All right.

MR. EBERT: Ladies and gentlemen, as the Court has told you I am Paul Ebert.

I'm fighting a cold and a sore throat, so that will probably benefit you. I might not be able to talk too much. But if you'll bear with me if I run out of voice during the course of this.

I just have several questions of you. There may be—let me ask one other question first.

Is there a Mrs. Shipp on the panel? I guess [31] not. I was going to ask for information. All right.

Would the fact that the Commonwealth under the law does not have to prove a motive, although the evidence may indicate a motive—would that have any bearing on your ability to determine guilt or innocence assuming that you were not satisfied that there was a motive?

THE JURY PANEL: (No response.)

MR. EBERT: There may be psychiatric testimony in this trial. Could you view that testimony in light of all the evidence in your own common experience and accept that testimony in conjunction with the other testimony?

THE JURY PANEL: (No response.)

MR. EBERT: Is there any person on the panel that could not do that or any person who would accept the so-called expert testimony simply because it came from an expert and not consider all the evidence in addition thereto?

THE JURY PANEL: (No response.)

MR. EBERT: I think the Court has told you, you're all aware that this case involves a charge which may be punished by death.

The Court has asked you this question, and I'm going to ask you this again.

[32] Is there any member of the panel that could not consider, if the law and circumstances justified the same, imposing death in this case?

MS. FELMLEY: (Indicating.)
MR. SUTER: (Indicating.)
MR. EBERT: Is there any member of the panel, if the law and evidence justified, you could not impose life in this case?
THE JURY PANEL: (No response.)
MR. EBERT: The last question I want to ask you, would anyone have a philosophical, moral, religious, or any other reason—I think other than you two persons, Ms. Felmley and Mr. Suter—that would prohibit you from imposing the death penalty?
THE JURY PANEL: (No response.)
MR. EBERT: Your Honor, other than the two that indicated they could not abide under the circumstances, I have no objection to any of the panel.
And I think they should be excused for cause in accordance with the Witherspoon case.
THE COURT: Mr. Fahy.
MR. FAHY: Your Honor, a point of clarification. I understand the Court will still go [33] through panels of four.
THE COURT: That's correct.
MR. FAHY: We wish to ask questions of the two individuals in question, and we would ask—
THE COURT: I'm going to give you that opportunity.
MR. FAHY: —if we can't do that of the panel?
THE COURT: I'm going to give you that opportunity. That's the reason I'm asking them to answer yes or no only.
You'll have an opportunity to elaborate on it.
Questions for the Defense for the entire panel?
MS. ROLLISON: Good morning again, ladies and gentlemen. My name is Lawrie Rollison, and I have one question for the entire panel.
Are any of you related to or acquainted with any of the following individuals who may be called as witnesses by the prosecution in this case?

I'm going to read out a list of names. If you recognize a name, would you please raise your hand.
Morrell Woods.
[34] THE JURY PANEL: (No response.)
MS. ROLLISON: Sergeant Ronald Henderson.
THE JURY PANEL: (No response.)
MS. ROLLISON: Billy Newman.
THE JURY PANEL: (No response.)
MS. ROLLISON: Joseph Clyburn.
THE JURY PANEL: (No response.)
MS. ROLLISON: Steve Kersse.
THE JURY PANEL: (No response.)
MS. ROLLISON: Michael Grimm.
THE JURY PANEL: (No response.)
MS. ROLLISON: Major Glenn Hill.
MS. DEIOTTE: (Indicating.)
MS. ROLLISON: Norman Dodson.
THE COURT: One lady, Ms. Deiotte, knows Major Hill.
MS. ROLLISON: Thank you. Do you know Major Hill?
MS. DEIOTTE: (Nodding head.)
MS. ROLLISON: Emmitt Cook.
THE JURY PANEL: (No response.)
MS. ROLLISON: Alda Kelly.
THE JURY PANEL: (No response.)
[35] MS. ROLLISON: Bert Hillmar.
THE JURY PANEL: (No response.)
MS. ROLLISON: Gail Miller.
THE JURY PANEL: (No response.)
MS. ROLLISON: Kenneth Moore.
THE JURY PANEL: (No response.)
MS. ROLLISON: L.H. Anderson.
THE JURY PANEL: (No response.)
MS. ROLLISON: L.W. Dury.
THE JURY PANEL: (No response.)
MS. ROLLISON: Rose Marie Anderson.
THE JURY PANEL: (No response.)

MS. ROLLISON: George Terry.
THE JURY PANEL: (No response.)
MS. ROLLISON: Warren Whitley.
THE JURY PANEL: (No response.)
MS. ROLLISON: Trooper Dunham.
MR. TSOU: Did you say Kenneth Moore?
MS. ROLLISON: Kenneth Moore.
MR. TSOU: I know a Kenneth Moore. I work with a Ken Moore.
MS. ROLLISON: Frances Fields.
THE JURY PANEL: (No response.)
[36] MS. ROLLISON: Michael Lawson.
THE JURY PANEL: (No response.)
MS. ROLLISON: Zeta Wade.
THE JURY PANEL: (No response.)
MS. ROLLISON: George Stephens.
THE JURY PANEL: (No response.)
MS. ROLLISON: Z.D. Ijams. I may be mispronouncing that.
THE JURY PANEL: (No response.)
MS. ROLLISON: Frank Saunders.
THE JURY PANEL: (No response.)
MS. ROLLISON: L.W. Lawson.
MS. FELMLEY: I know Mr. Lawson.
MS. ROLLISON: Your name, please?
MS. FELMLEY: Martha Felmley.
MS. ROLLISON: R.A. Kline.
THE JURY PANEL: (No response.)
MS. ROLLISON: Sergeant Harold McDowell.
THE JURY PANEL: (No response.)
MS. ROLLISON: Michael Gray.
THE JURY PANEL: (No response.)
MS. ROLLISON: Keith Shifflett.
THE JURY PANEL: (No response.)
[37] MS. ROLLISON: J.J. Mason.
THE JURY PANEL: (No response.)
MS. ROLLISON: Paul X. Bolt.

THE JURY PANEL: (No response.)
MS. ROLLISON: Kenneth Rainey.
THE JURY PANEL: (No response.)
MS. ROLLISON: Allen Douglas.
THE JURY PANEL: (No response.)
MS. ROLLISON: Paul Fair.
THE JURY PANEL: (No response.)
MS. ROLLISON: Gloria Washington.
THE JURY PANEL: (No response.)
MS. ROLLISON: Kevin Boxley.
THE JURY PANEL: (No response.)
MS. ROLLISON: Richard Harris.
THE JURY PANEL: (No response.)
MS. ROLLISON: Robert Owens.
THE JURY PANEL: (No response.)
MS. ROLLISON: David Watson.
MS. DEIOTTE: I know him.
MS. ROLLISON: Kenneth Woods.
THE JURY PANEL: (No response.)
MS. ROLLISON: R. Phillips.
[38] MS. WALTERS: (Indicating.)
MS. ROLLISON: J. Hamilton.
THE JURY PANEL: (No response.)
THE COURT: Excuse me. There's one lady over there.
MS. ROLLISON: Oh, yes, ma'am.
MS. WALTERS: R. Phillips.
MS. ROLLISON: Your name, please.
MS. WALTERS: Sheila Walters.
MS. ROLLISON: R.C. Zinn.
THE JURY PANEL: (No response.)
MS. ROLLISON: S.S. Lanham.
THE JURY PANEL: (No response.)
MS. ROLLISON: H.I. Dulaney.
THE JURY PANEL: (No response.)
MS. ROLLISON: W. Cox.
THE JURY PANEL: (No response.)

MS. ROLLISON: J.R. Fry.
MS. DEIOTTE: Fry.
MS. ROLLISON: R.A. Cantarella.
MS. DEIOTTE: Fry.
MS. ROLLISON: That's Ms. Deiotte again.
Thank you so much.

[39] MR. FAHY: Your Honor, may I confer with counsel very briefly?

THE COURT: You may, sir.

(Ms. Rollison and Mr. Fahy conferred, off the record.)

MS. ROLLISON: To those of you who have indicated that you've known one of the persons that I've read off, would the fact that you know them or are acquainted with them affect your impartiality in this case?

THE JURY PANEL: (No response.)

MS. ROLLISON: Has any one of you patronized Dale City Floors?

MS. SANTIAGO: I have.

MS. ROLLISON: Mrs. Santiago.

MR. FAHY: What's her name?

MS. ROLLISON: Mrs. Santiago.
Do any of you live—oh, pardon me.

MR. LAYTON: I've been there but I've never purchased anything. My name is Michael Layton.

MS. DEIOTTE: Ms. Nopwasky was a client of mine. I haven't been in the store but I've talked to her on the phone.

[40] MS. ROLLISON: Anyone else?

MR. RISH: I've been in the store.

MS. ROLLISON: Yes, sir. You've been in the store before? And your name, sir.

MR. RISH: Rish.

MR. FAHY: I didn't hear the name.

MR. RISH: Barney Rish.

MR. Fahy: Thank you.

MS. ROLLISON: Do any of you live within a mile of Ashdale Plaza, and that's located on the eastern end of Prince William County in the Woodbridge/Dale City area?

MR. BOOTHE: I live on Cloverdale. My name is Boothe. I think I'm within a mile.

MR. MERRITT: I live on Dillon Avenue, within a mile.

MR. RISH: Possibly on the far end.

THE COURT: Another one.

MS. WOLFE: I don't know how far. I'm in the Hillendale section.

MS. ROLLISON: All right. I'm familiar with that area.

MR. FAHY: Your name, ma'am?

[41] MS. WOLFE: Rita Wolfe.

MS. SANTIAGO: I live on Mapledale.

MS. ROLLISON: Anyone else?

MS. DERE: (Indicating.)

MS. ROLLISON: Yes, ma'am.

MS. DERE: I live in the Glendale section.

MS. ROLLISON: Your name, please.

MS. DERE: Marlene Dere.

MR. FAHY: I'm sorry. I've got a hearing problem. Could you repeat that.

(Laughter.)

MS. DERE: My name is Dere, D-E-R-E.

MR. FAHY: Thank you.

MS. HAINES: Do you want to know everybody in Dale City?

MS. ROLLISON: No, just—so you're in Dale City as well.

THE COURT: The question is anyone that thinks you live within a mile of Ashdale Plaza.

MS. ROLLISON: Did any of you attend any campaign meetings or rallies for Mr. Paul Ebert?

MS. DEIOTTE: (Indicating.)

MS. ROLLISON: Mrs. Deiotte.

[42] Did any of you participate in or contribute to any of the election campaigns for Mr. Paul Ebert for Commonwealth's Attorney?

MR. FAHY: I thought I saw a hand in the back, Your Honor. Maybe I didn't.

May I confer with counsel again just very briefly?

THE COURT: Yes. As a matter of fact, I'll permit you to stand there with her.

(Laughter.)

(Mr. Fahy and Ms. Rollison conferred, off the record.)

MS. ROLLISON: Let me back up a bit. My counsel has reminded me of something I forgot to ask.

Does the fact that you all live close to Ashdale Plaza, within one mile, would that affect your ability to judge this case impartially?

THE JURY PANEL: (No response.)

MS. ROLLISON: Mrs. Deiotte, the fact that you participated in the campaign for Paul Ebert, would that affect your impartiality in this matter?

MS. DEIOTTE: That wasn't really the question that was asked. You asked if I had attended, and I [43] attended as a news reporter.

MS. ROLLISON: If you had attended. The fact that you had attended, would that affect your impartiality?

MS. DEIOTTE: No. I don't believe so.

MS. ROLLISON: Are any of you currently a law enforcement officer, or do any of you have law enforcement officers as members of your immediate family or as close friends?

JURORS: (Indicating.)

MS. ROLLISON: Yes. Let's start on this end. Mrs. Haines.

MS. HAINES: My father is a SAC at the FBI, and I work for Criminal Investigations.

MS. ROLLISON: Yes.

MS. SANTIAGO: My husband is Secret Service.

MS. ROLLISON: Your name?

MS. SANTIAGO: Mrs. Santiago.

MS. WALTERS: My name is Sheila Walters and my husband is employed by the U.S. Park Police and—

MR. FAHY: Is that Ms. Wolfe?

MS. ROLLISON: That's Ms. Walters.

MR. FAHY: Walters.

[44] MS. BREWER: Helen Brewer. My girlfriend's son is a policeman.

MR. RISH: My son's friend is a Prince William police officer.

MS. DAME: My husband is Secret Service, Dame.

MS. DEIOTTE: I'm a former Policeman Courts Reporter and I have lots of friends at the Police Department.

MS. ROLLISON: Okay. Did I miss anyone?

THE JURY PANEL: (No response.)

MS. ROLLISON: Would the fact that you all know or may be related or acquainted with police officers, would that affect your impartiality in this case?

THE JURY PANEL: (No response.)

MS. ROLLISON: Do any of you believe that the testimony of a police officer or investigator carries more weight than the testimony of an ordinary citizen witness?

THE JURY PANEL: (No response.)

MS. ROLLISON: Have any of you appeared as a witness for the Prosecution in a criminal case?

MS DEIOTTE: I have.

MR. STREET: Can I ask a question?

MS. ROLLISON: Yes.

[45] MR. STREET: I was subpoenaed but I never did, you know—

MS. ROLLISON: It was for a criminal matter?

MR. STREET: Yes. It was a—a kid was selling—was reimbursing auto parts and I happened to buy an auto parts from that place. But nothing—you know, I never did have to say anything.

MR. MARTIN: (Indicating.)

MS. ROLLISON: Yes, sir.

MR. MARTIN: I may have. I'm not sure. I was in a Maryland case. I don't know if that's criminal or not.

MS. ROLLISON: Okay. Your name.

MR. MARTIN: William Martin.

MS. ROLLISON: For those of—yes, sir.

MR. LAYTON: I also was subpoenaed when I used to do work in a store and a bad check was passed. I'm not sure if that's any criminal, but I never testified in the Court. They settled it out of Court.

MS. ROLLISON: Anyone else?

THE JURY PANEL: (No response.)

MS. ROLLISON: Would the fact that you all may have been subpoenaed or called as a witness, or testified [46] or not testified as the case may be in a criminal matter, would that affect your ability to render an impartial verdict in this matter?

THE JURY PANEL: (No response.)

MS. ROLLISON: Have any of you served on a Jury before?

THE JURISTS: (Indicating.)

MS. ROLLISON: Your names.

MS. BREWER: Yes. Two and a half years ago I served on two different cases.

MR. FAHY: Your name, please.

MS. BREWER: Helen Brewer.

MS. DAME: Sandra Dame. About five or six years ago.

MS. THORPE: Evelyn Thorpe. About five or six years ago.

MS. ROLLISON: Can you speak up just a little bit. I'm having a hard time—

MS. THORPE: Evelyn Thorpe.

THE COURT: Ms. Thorpe. Five or six years ago.

MS. ROLLISON: Yes, ma'am.

MS. FELMLEY: I served on Grand Jury.

[47] MS. SANTIAGO: I served, but it was not here, in New York City, and you just, you know, phone in, but they told me they didn't need me.

MS. ROLLISON: Yes, sir.

MR. MERRITT: I've served on a number of military court martials.

MS. ROLLISON: Does the fact that you may or may not have served on a Jury before, would that affect your ability to render an impartial verdict in this case?

THE JURY PANEL: (No response.)

MS. ROLLISON: For those of you who answered in the affirmative—well, skip that.

Have you or any of your family members been a victim of a crime?

MS. DEIOTTE: Yes. My mother.

MS. ROLLISON: Ms. Deiotte. Yes, sir.

MR. LAYTON: I've been robbed a couple of times.

MS. ROLLISON: Your name again.

MR. LAYTON: Michael Layton.

MS. ROLLISON: Would the fact that you all have been a victim of crimes, would that affect your ability to be impartial in this matter?

[48] THE JURISTS: (Shaking heads.)

MR. FAHY: Could I speak with Ms. Rollison one more time.

(Mr. Fahy and Ms. Rollison conferred, off the record.)

MS. ROLLISON: Thank you.

Do any of you all have friends or neighbors that have been victims of violent crimes such as rape, robbery, murder, or assault and battery?

THE JURISTS: (Indicating.)

MS. ROLLISON: Ms. Walters.

MS. WALTERS: (Nodding head.)

MS. DEIOTTE: Rape and murder.

MS. ROLLISON: Would the fact that your friends have been victims of a violent crime affect your impartiality in this matter?

MS. WALTERS: (Shaking head.)

MS. DEIOTTE: (Shaking head.)

MS. ROLLISON: Are any of you opposed to the Islamic religion?

MS. HAINES: Yes.

MS. ROLLISON: Ms. Haines.

MS. HAINES: (Nodding head.)

[49] MS. ROLLISON: Thank you.

Ms. Haines, the fact that you're opposed to the Islamic religion, would that cause you to have a problem with rendering a fair and impartial verdict in this matter?

MS. HAINES: I'd have to know the facts first, the facts of the case.

MS. ROLLISON: Well, you're—

MS. HAINES: No. No, to answer your question.

MS. ROLLISON: Thank you.

THE COURT: I presume that those other questions which the Court has approved, you wish to take up in the limited sessions?

MS. ROLLISON: Yes, Your Honor.

THE COURT: At this particular time, ladies and gentlemen, I'm going to ask my Bailiff to take you back to Jury rooms in the back.

I'm going to ask you not to discuss what we've done thus far, anything relevant to this case whatsoever.

I'm going to be bringing you back in groups of four, in which there will be more specific questions asked by counsel concerning some of the answers you have thus [50] far given.

Then when we get through those specific questions, we'll send those persons back to still another room. I hope we've got enough rooms back here to keep everybody separated.

(Laughter.)

We have two other Juries in addition to this one, so we are cramped on space, but my Bailiff will be able to work it out.

I assure you and I admonish you that we cannot tolerate any conversation among yourselves or with anyone else concerning the questions you thus far have been asked nor anything about the case, the nature of the case or what we're doing here today.

It's very, very important that we keep an open mind and at all times remain free of any outside influence that may in any way, shape, or form have any influence on your ultimate decision.

So with that in mind I'm going to ask the Bailiff to take you back. Then I'm going to ask for the first four. My Clerk will tell him what four we want to bring back.

The persons who are spares, you will remain [51] seated on the front row.

You're doing a good job of paying attention to the questions that are being asked. It will shorten the process if we have to ask you questions.

(Whereupon, at approximately 11:19 o'clock a.m., the Jury panel retired from the Courtroom.)

MR. FAHY: Your Honor, I have a motion at this time if I may.

THE COURT: All right. State your motion.

MR. FAHY: Your Honor, I would move to—

THE COURT: Excuse me just a second. We still have a Jury panel in here.

I'm sorry, but the motion being a little bit unusual, I'm going to have to ask the panel to go out also, the ten extra persons who are panel members. So if you will come in this direction.

Take them down the hall and please put them in a Jury room separate from the others.

(Whereupon, at approximately 11:20 o'clock, the Jury panel alternates retired from the Courtroom.)

THE COURT: All right, Mr. Fahy.

MR. FAHY: Your Honor, I would move to strike for cause all the persons who indicated in the affirmative [52] they had acquired information about this case.

The list as I noted it was Merritt, Boothe, Runion, Layton, Walters, Taylor, Haines, Syphrett I think it is, Suter, Wolfe, Thorpe, Forehand, Felmley, Dillon, Dame, Deiotte, and Paul Tsou, T-S-O-U.

My argument is simply this. All of those individuals indicated that they had information about this case.

Your Honor has previously heard our argument in support of asking these people under 8.01-358 and the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, on that authority we had requested to ask these people what it is they know specifically under that Code section and under those Constitutional Amendments.

That request having been denied, we are in a position where they have answered that question in the affirmative, they have also answered Your Honor's question to the effect that they can make an impartial decision in essence, words to that effect.

But we submit under the authority that we have cited that that's insufficient, and we would ask that all of those people be struck for cause.

[53] THE COURT: All right. Mr. Ebert, do you wish to be heard?

MR. EBERT: If it please the Court, it's clear under the law that the test is not whether or not they have heard it. The question is whether or not they can put that aside and render a fair and impartial verdict.

And that they have done.

It's not necessary that people live in a vacuum. As long as they can be fair and impartial, that's all the Court should require, and of course the Court's standard instruction is to that effect.

And quite frankly not to hear what goes on in society for a panel this large would be very unusual.

Based on that, I would ask the Court to deny that motion.

THE COURT: All right. Your motion is denied. We're going to bring these persons back and we're going to give you an opportunity to go into it to learn more about what they may have known or whether or not they can reach a fair and impartial verdict.

At this time for that reason I'm going to deny your motion.

MR. EBERT: If it please the Court I have— [54] do you have any further motions, counsel?

MR. FAHY: We had one other motion. Ms. Rollison has it.

MS. ROLLISON: At this time I would like to renew my motion for a change of venire or venue.

I'm bringing it up at this point in the trial. We have had part of the selection of the Jurors. Many of them have indicated that they have read publicity.

I would like to submit as a Defense exhibit some more paper articles that have come out since the time that we were in Court last.

(Ms. Rollison handed a document to the Court for his examination.)

As the Court can see, the lengthy publicity continues. This case has been covered.

You know, taking each article separately obviously they're not going to show a whole lot of publicity.

But taken as a whole, the cases I've cited earlier in my prior motion, I wish to incorporate them here, and I also wish to add as authority for this motion the Sixth, Eighth, and Fourteenth Amendment of the U.S. Constitution.

[55] Inasmuch as the Sixth Amendment promises impartial Jury and effective assistance of counsel, we think that the impartiality of these Juries is preeminent in a trial of this type.

The Eighth Amendment as well, we feel states that—particularly in a death case—that impartiality is heightened. It's absolutely necessary in a case at this point.

The Fourteenth Amendment obviously is due process.

All these newspaper articles, some of these Jurists have indicated that they may or may not have seen.

We don't know what they've seen. We're not going to be allowed to inquire as to what they have seen or what they have heard.

We believe that that is also violative of the Sixth, Eighth, and Fourteenth Amendment as per Mr. Fahy's earlier motion.

At this time I would like to call Mark Woolverton to the stand.

THE COURT: Wait just a second. You're not going to call him to the stand yet. The Commonwealth is going to have the opportunity to say something.

[56] MS. ROLLISON: That's correct.

THE COURT: Mr. Ebert.

MR. EBERT: If it please the Court, I think there's nothing before the Court at this time to indicate that we would not be able to get a fair and impartial panel.

As a matter of fact, to the contrary, very few people had indicated—I guess none of them really indicated at this stage, with the exception of one person and he even didn't disqualify himself on that basis.

So I would submit to the Court that the motion should be denied at this time.

THE COURT: Proffer what your witness would say.

MS. ROLLISON: Mr. Woolverton is the Police Department spokesperson. On or about December 17th, 1988, an alleged incident occurred at the local Prince William County Jail.

Mr. Woolverton over his objections made statements to the press regarding Mr. Mu'Min's involvement.

He would state I believe that he was directed to make those statements that he did not think he should [57] make by the Commonwealth Attorney's office.

THE COURT: The testimony at this time would be denied you. The motion would be denied.

We've been through the whole thing, Ms. Rollison, and the panel is surprisingly as free as it is. To be as free of publicity, I think sometimes media people think that their stories get a whole lot more publicity than so.

But no one presupposes that this country lives in a vacuum and doesn't read or hear some news.

The question is whether or not they can sit here and listen to this case, and decide the case based upon the law and the evidence, and that evidence being what they get in this Courtroom.

And they've all answered that if we're to believe their oaths, and we have no reason not to believe them.

For those reasons your motion is denied.

* * * *

[59] MR. EBERT: Your Honor, with regard to the questions, are we going to be limited to—

THE COURT: We're going to have to play it by ear.

MR. EBERT: publicity or go into other matters? I've asked all the questions I have.

THE COURT: Well, I think the Defense asked all the questions they wanted to ask, too. Is that right?

MS. ROLLISON: No, Your Honor.

MR. FAHY: I understand you to say that we will be able to ask them what it is they've heard. Am I—

THE COURT: Well, we're going to go into the media.

Have you asked all questions concerning everything?

MS. ROLLISON: No.

THE COURT: Well, I thought that's what you were up there for, Ms. Rollison.

* * * *

[63] A JURIST: I guess I did discuss the case when I read the newspaper with my wife.

A JURIST: Yes.

A JURIST: The same here.

MS. ROLLISON: As a follow up to that, if so, with whom, when, and where, and what do you remember you discussed? Starting with you.

THE COURT: Excuse me. I don't think we need to go into what these gentlemen may have discussed with their wife in this case.

The question is whether or not they have as a result of the discussion formed an opinion.

A JURIST: No opinion.

A JURIST: No opinion.

THE COURT: And the other follow up question is as a result of that, are you sensible of any bias or prejudice.

Then the third would be whether or not they can reach a fair and impartial verdict considering what they have discussed, et cetera.

Ms. Rollison, if you wish to ask those questions.

[64] MS. ROLLISON: You've heard them from the Judge.

THE COURT: Let me ask you this. As a result of the discussion of what you've heard, read, or whatever source, have you formed an opinion?

A JURIST: No, sir.

A JURIST: No, sir.

THE COURT: Have the discussions caused you to have any bias or prejudice in any way?

A JURIST: No, sir.

A JURIST: No.

THE COURT: Considering what you have heard, or read, and discussed in this case, can you take a seat in the Jury box with an open mind and wait until the entire case is presented before reaching a fixed opinion or conclusion as to guilt or innocence?

A JUROR: Yes, sir.

THE COURT: In other words, can you go into this case with an open mind and try the case based upon the law and the evidence, the law being what I tell you is the law, the evidence being that which you hear from the mouths of the witnesses and any documentary evidence?

A JUROR: Yes, sir.

[65] THE COURT: Is there anyone that cannot do that?

THE JURY PANEL: (No response.)

THE COURT: Now go ahead, Ms. Rollison.

MR. FAHY: Your Honor, I would just like a point of clarification. I understand from Your Honor's questions that we are prohibited from asking specifically what it is they've heard.

THE COURT: Mr. Fahy, I'm not going to make this Jury or any other until I hear the Supreme Court tell me that I've got to delve into what man and wife speak of in the confines of their home. I think it's absurd.

MR. FAHY: I just wanted to clarify.

THE COURT: For that reason, the question is whether or not what they've heard, and they don't have to divulge it, but has that caused them to reach a bias, or prejudice, or fixation so that they cannot be fair and impartial.

That's the question.

MR. FAHY: I don't mean to belabor the point, but we would note our exception for the previous—

THE COURT: Your exception is duly noted.

* * * *

[69] MS. ROLLISON: Have you discussed this case with anyone?

MS. WALTERS: I discussed it with my Lieutenant. She lived on the same block as the victim.

MS. ROLLISON: The fact that you discussed this case with your Lieutenant, has that caused you to have an opinion in this matter?

MS. WALTERS: No.

MS. ROLLISON: Are you sensible of any bias or prejudice because of that discussion?

MS. WALTERS: Not consciously.

MS. ROLLISON: But maybe unconsciously?

MS. WALTERS: (Nodding head.)

MS. ROLLISON: Would you be able to listen to the law and the evidence as presented here today, and would you be able to follow that in light of your discussion with your Lieutenant in order to deliver a fair and impartial verdict in this matter?

MS. WALTERS: I think so.

MS. ROLLISON: So you think you would be able to control your unconscious?

MS. WALTERS: Well, I would hope so. I would [70] try to—

MR. EBERT: Your Honor, I don't believe she—she said she may have some unconscious. All of us may have something unconscious. That's not really the test. It's only what we're sensible of.

THE COURT: I need to be a little more specific.

You've said you're not conscious of it, you're not sure, and those sorts of things.

MS. WALTERS: I find that very hard to say, what you can keep coming in and out of your mind on what you've had in past discussions with someone.

THE COURT: I guess it comes down to this question for you, Ms. Rollison. I'm looking right at the one that's been approved.

Considering what you've heard in your discussions in that case with your Lieutenant who lived on the street with the lady that was killed, do you believe that you can enter the Jury box with an open mind and wait until the entire case is presented before reaching a fixed opinion or conclusion as to the guilt or innocence of this accused?

MS. WALTERS: Yes, I think so.

[71] THE COURT: Is there any question in your mind about it?

MS. WALTERS: No, sir. There's no question in my mind about it.

THE COURT: Let me say this. The Jury is going to be given—that is the ultimate Jury is going to be given an oath to try the case based upon the law and the evidence.

The law, as I said, is what I have to tell you is the law. The evidence will be what you hear. And that oath is going to be taken, so you'll be bound by that oath if you're a Juror.

With that in mind, can you reach a fair and impartial verdict based upon the law and the evidence?

MS. WALTERS: Yes, sir.

THE COURT: Are you sensible of any bias or prejudice as a result of having discussed this with a neighbor who I presume must have known the lady that was killed?

MS. WALTERS: Not as a good friend but knew who she was, yes.

THE COURT: Are you sensible of any bias or prejudice as a result of that?

[72] MS. WALTERS: No, sir.

THE COURT: All right. Go ahead, Ms. Rollison.

MS. ROLLISON: Mrs. Walters, you indicated that you were the only one of the four of you that has discussed this case with anyone else.

Did they express an opinion to you?

MS. WALTERS: No. It was just a case of she was very sorry this happened, and she knew the person.

MS. ROLLISON: Thank you.

THE COURT: All right. Thank you very much.

* * * *

[74] MS. ROLLISON: Are you all sensible of any bias or prejudice by virtue of holding or having held that type of job?

THE JURISTS: (No response.)

MS. ROLLISON: After hearing all the law and evidence that would be presented in this case, would both of

you be able to render a fair and impartial verdict in this matter?

THE JURISTS: (Nodding head.)

THE COURT: Let's put that question the other way around. Is there any one of the two of you that could not?

THE JURISTS: (No response.)

THE COURT: There's no answer. Thank you. Go ahead now with the other questions.

MS. ROLLISON: Have any of you been the victim of a racial incident involving a black person?

[75] THE JURY PANEL: (No response.)

MS. ROLLISON: In this case the Defendant is black. The victim was a white female. She was found nude from the waist down.

Do any of you believe that your deliberations might be affected by these facts so as to create any bias or prejudice?

THE JURY PANEL: (No response.)

MS. ROLLISON: Have you discussed this case with anyone?

MS. HAINES: Before coming here today?

MS. ROLLISON: Yes.

MS. HAINES: Yes.

MS. ROLLISON: Would the fact that you've discussed this case with someone else, did they state an opinion to you?

MS. HAINES: Pardon me?

MS. ROLLISON: Did they state an opinion to you on this matter?

MS. HAINES: No.

MS. ROLLISON: Did the fact that you discussed this case cause you to form an opinion in this matter?

MS. HAINES: No.

[76] MS. ROLLISON: Are you sensible of any bias or prejudice that may have evolved from your discussions?

MS. HAINES: No prejudice, other than the ones already stated by me.

MS. ROLLISON: Going back to that, you have answered affirmatively to several questions that I asked.

You said that you're opposed to the Islamic religion; is that correct?

MS. HAINES: Yes.

MS. ROLLISON: Would the fact that you're opposed to that religion—I know I asked you this before—but do you have an opinion that those thoughts in your mind would affect this case?

Do you have an opinion on this case as a result of that?

MS. HAINES: I don't know.

MS. ROLLISON: Given your opposition to the Islamic religion, would that cause you to have any bias or prejudice in this matter?

MS. HAINES: I think that's what you just asked me. No, I don't think so.

MS. ROLLISON: After you listen to all the law and evidence in this matter would you be able to [77] render a fair and impartial verdict?

MS. HAINES: I hope to God I can.

MS. ROLLISON: Mrs. Haines, you have indicated that you are acquainted with one of the attorneys, and that attorney is me; is it not?

MS. HAINES: Yes, it is.

MS. ROLLISON: It's correct that I represented your son in criminal charges that you filed; is that correct?

MS. HAINES: That's incorrect. I personally did not file them.

MS. ROLLISON: But you did appear as a Commonwealth's witness in that matter?

MS. HAINES: Yes, I did.

MS. ROLLISON: On behalf of your husband?

MS. HAINES: And the Police Department, yes.

MS. ROLLISON: And the Police Department, right. That was in a criminal matter?

MS. HAINES: Yes.

MS. ROLLISON: Would the fact that you appeared as a Commonwealth witness, does that cause you to have an opinion in this matter?

[78] MS. HAINES: No, it doesn't.

MS. ROLLISON: Would that cause you to have any bias or prejudice in this matter?

MS. HAINES: I guess you don't know until you're tested. I can't answer that one hundred percent. I'm sorry.

MS. ROLLISON: Okay.

MS. HAINES: I hope I wouldn't. I hope my experience has taught me that I wouldn't. But I don't know that until judged.

MS. ROLLISON: Putting aside the fact that you were a Commonwealth's witness, would you be able to put that aside, listen to the evidence and the facts in this case, and render an impartial and fair verdict?

MS. HAINES: I certainly hope so. That's my job at work.

MS. ROLLISON: May I approach the Bench?

THE COURT: You may, as well as all counsel and the Defendant.

* * * *

[80] MS. ROLLISON: The fact that you know one of us, would you be able to set aside your feelings toward us either one way or the other?

MR. EBERT: Your honor, she doesn't have any bias, and I don't think she can set it aside if she doesn't have any.

THE COURT: Objection is well taken, but go ahead.

MS. ROLLISON: Whether you feel favorably or unfavorably toward one of us even though you've indicated that you have no bias or prejudice, would you be able to set aside your knowledge of that attorney and render a fair and impartial verdict in this case?

MR. EBERT: Well, Your Honor, I'm going to object to that, too. She can't set aside knowledge. We all know what we know. She said she can be fair and unbiased.

I don't think that's a proper question.

THE COURT: The question is considering what she has heard and everything, can she go into the Jury box, et cetera.

And I've said it so many times, can you reach [81] a fair and impartial verdict based upon the law and the evidence without regard to what feelings you may have toward anyone in this Courtroom?

MS. HAINES: I certainly hope so. I don't believe that counsel is on trial and I'm not here to judge counsel.

THE COURT: Thank you, ma'am.

Next question.

MS. ROLLISON: Nothing further.

THE COURT: Excuse me. That's not all. I'll pick them up for you. You're missing one about the—

MS. ROLLISON: That's correct, Your Honor.

THE COURT: All right. Go ahead.

MS. ROLLISON: Have you discussed this case—we did ask that one, Your Honor.

THE COURT: But I am not sure that some of these persons may not have read something about it. I'll give you an opportunity.

Have any of you read anything in the newspaper concerning this case at all?

MR. TAYLOR: (Indicating.)

MR. SMITH: (Indicating.)

MS. HAINES: (Indicating.)

[82] THE COURT: Now go with that.

MS. ROLLISON: On the basis of what you've read in the newspapers, have you reached an opinion in this matter?

THE JURY PANEL: (Shaking heads.)

MS. ROLLISON: Are any of you sensible to any bias or prejudice after what you've read in the papers in this case?

THE JURY PANEL: (No response.)

MS. ROLLISON: Would all of you be able to reach a fair and impartial verdict after reading what you've read in the papers?

MS. HAINES: No.

MS. ROLLISON: You wouldn't be able to reach a fair and impartial—

MS. HAINES: If I understood your question correctly—repeat the question.

MS. ROLLISON: Would you be able to reach a fair and impartial verdict in this case after having read what you've read in the newspapers?

MS. HAINES: Oh. I—

MR. EBERT: I don't think that's the test. The test is could they put it aside and reach a fair and [83] impartial verdict based on the evidence.

THE COURT: The law and the evidence.

MS. ROLLISON: They didn't indicate anything, sir.

THE COURT: All right. Are you satisfied, Ms. Rollison?

MS. ROLLISON: Yes, Your Honor.

MR. FAHY: Your Honor, I have a motion. Perhaps I should make it after the panel is out.

THE COURT: Not now.

MR. FAHY: Yes, sir.

THE COURT: Any other questions? Does counsel want to confer? Any other questions for this panel of four?

Thank you. You may take them out. Hold before we bring anybody else in.

(Whereupon, the four Jurors retired from the Courtroom.)

MR. FAHY: Your Honor, I would ask to strike Ms. Haines for cause.

As I recollect what she said, she indicated that she hoped that she could render an impartial decision.

[84] I believe this was in the context of having been a witness for the Commonwealth at some point.

She made statements to the effect that you don't know until you're tested, and it was her hope that she could render a fair and impartial decision.

In light of those reservations and in light of the principle of law that should there be any doubt about the

qualifications of a Juror that doubt should be resolved in favor of the Defendant, I would ask that that person, Ms. Haines, be struck for cause.

THE COURT: Would you like to be heard?

MR. EBERT: Well, she's answered I think thoroughly and completely. She did say at one point in time she hoped she could, and we all hope that we can, but she did say that she could do it, and that's all that's required.

She said even though she knew counsel, that counsel was not on trial and—I think the question came with regard to what she had heard. But she said she could put that aside and enter a fair and impartial verdict.

She said that a number of times.

I think she's entirely proper to be on the panel.

[85] THE COURT: I'm going to grant the motion. I'm going to strike her for cause because I feel as though she hasn't been as frank as she could.

She said one time she hoped she could, but she couldn't be tested, and she hoped to God she could.

So under the circumstances I'm going to cause her to step down for cause.

So what we're going to do now, gentlemen, is we'll excuse her and we'll go on with the other panel of four.

Then when we get through all the panels of four, we're going to have to start with what we need at that time additional.

MR. EBERT: For the record, would the Court note the Commonwealth's exception.

THE COURT: The Commonwealth's exception is duly noted on striking Ms. Haines.

All right. Bring in the next four and then you can take Ms. Haines out and excuse her.

(Whereupon, the next four Jurors returned to the Courtroom and resumed their seats in the Jury box.)

All right. If you'll just take a seat on the front row in the cushioned chairs.

* * * *

[87] MS. ROLLISON: Have you discussed this case with anyone?

THE JURY PANEL: (No response.)

MS. ROLLISON: I believe a few of you indicated earlier that you had read some newspaper accounts or heard accounts of this case.

Can you indicate again which one of you—have you read any newspapers or any news accounts of this matter?

MR. SUTER: I've seen headlines.

MS. ROLLISON: The fact that you've seen headlines or read headlines, has that caused you to form an opinion in this matter?

MR. SUTER: No.

MS. ROLLISON: Are you sensible of any bias or prejudice that you may hold at this time in this matter?

MR. SUTER: Sensible of—I'm not sure I understand the question.

MS. ROLLISON: Do you have any bias or [88] prejudice at this time from having read the headlines?

MR. SUTER: No.

MS. ROLLISON: Mr. Dailey, you indicated that you're with a small telecommunications firm—

MR. DAILEY: Yes, ma'am.

MS. ROLLISON: —and that they would be hampered financially by your absence for this period.

MR. DAILEY: Yes, ma'am.

MS. ROLLISON: Keeping that in mind, would that have an effect on your ability to deliberate in this matter?

MR. DAILEY: I feel that it could somewhat hamper it. Probably, yes.

MS. ROLLISON: Do you feel that you would be able to take the time that you should to deliberate in this matter, or do you feel like you would be rushed?

MR. DAILEY: I feel like I would be—

MR. EBERT: I think the Court's gone into this aspect of it and—

THE COURT: I've already gone into that. Go ahead, another question, Ms. Rollison.

MS. ROLLISON: Has anyone expressed any opinion about this case to you?

[89] THE JURY PANEL: (No response.)

MS. ROLLISON: Mr. Suter, you've indicated that you possibly hold a philosophic objection or something to the death penalty.

MR. SUTER: That's correct.

MS. ROLLISON: If you were seated as a Juror in this matter and you heard all the law and the evidence, would you be able to follow the law and the evidence that you heard in this case and impose the death penalty if you felt it was merited by the law and the evidence?

MR. SUTER: It would be difficult, very difficult.

MS. ROLLISON: When you say it would be difficult, would you say that you could never?

MR. SUTER: I would say that I would have to look at guilt or innocence different than penalty. They would have—I would have to look at them separately.

MS. ROLLISON: If you believed it to be warranted by the law and the evidence, would you be able to vote for the death penalty?

Let's say you go through the whole case, you hear everything, the Judge instructs you on the law, you've heard all the evidence.

* * * *

[93] THE COURT: Let me ask a couple of questions.

You've all heard or seen—heard something about this in one way, shape, or form.

Can you go into a Jury box with an open mind, wait until the entire case has been presented before you reach a fixed opinion or conclusion as to the guilt or innocence of the accused?

Is there anyone that cannot do that?

THE JURY PANEL: (No response.)

THE COURT: Should you reach that opinion that beyond a reasonable doubt the Defendant is guilty of capital murder, then at a later stage of the proceeding, it's my understanding, Mr. Suter, you could consider—it would be difficult, but you could consider the death penalty if the Court instructs you that was one of the options?

MR. SUTER: I have a sense of a line being drawn by—by what I read in the newspapers of when the death penalty would be applied.

* * * *

[99] MS. ROLLISON: If I might inquire, what type of law does your firm handle?

MS. FOREHAND: Oh, well, I'm under the communications and business crimes, but we handle quite a lot. It's general.

MS. ROLLISON: So it's business and communications?

MS. FOREHAND: Yes. That's what I'm under.

MS. ROLLISON: Have any of you been a victim of a racial incident involving a black person?

THE JURY PANEL: (No response.)

MS. ROLLISON: In this case the Defendant is black. The victim was a white female. She was found nude from the waist down.

Do any of you believe that your deliberations in this matter might be affected by these facts so as to create any bias or prejudice?

THE JURY PANEL: (No response.)

MS. ROLLISON: Have you discussed this case with anyone?

THE JURY PANEL: (No response.)

MS. ROLLISON: I believe that some of you may [100] have indicated earlier that you have read some newspaper accountings of this matter.

THE JURY PANEL: (Nodding heads.)

MS. ROLLISON: Have the accounts that you have read caused you to form an opinion in this matter?

THE JURY PANEL: (Shaking heads.)

MS. ROLLISON: Do you know of any bias or prejudice in this matter as a result of having read what you've read in the papers?

THE JURY PANEL: (Shaking heads.)

MS. ROLLISON: Has anyone expressed an opinion about this case to you?

THE JURY PANEL: (Shaking heads.)

MS. ROLLISON: Thank you.

THE COURT: Considering what you have heard or read about this case, or from whatever source you may have heard anything, is there anyone that cannot enter the Jury box, take an oath as a Juror, have an open mind, wait until you hear the entire case, until the entire case has been presented before you reach a fixed opinion or conclusion as to the innocence or guilt?

Is there anyone that cannot do that?

THE JURY PANEL: (No response.)

* * * *

[102] MS. ROLLISON: Are you aware of any bias or prejudice you may have in this matter?

MS. SANTIAGO: No, I'm not.

MS. ROLLISON: Mrs. Santiago, you've indicated earlier that you have either patronized Dale City Floors—

MS. SANTIAGO: Yeah. I knew Gladys—well, not as friendly, friendly but I've gone to the store and bought a couple of things from her, and then, you know, buys and stuff, but we weren't friends. I had just seen her and knew her.

[103] MS. ROLLISON: More like casual friends?

MS. SANTIAGO: Yeah—not even that. Just—like a client, you know.

MS. ROLLISON: Would the fact that you talked with her and knew the victim in this matter cause you to form an opinion?

MS. SANTIAGO: No, ma'am.

MS. ROLLISON: Are you aware of any bias or prejudice you may have in this matter?

MS. SANTIAGO: No.

MS. ROLLISON: If you heard all the evidence and the law in this case would you be able to render a fair and impartial verdict and set aside your knowledge of Mrs. Nopwasky?

MS. SANTIAGO: Yes.

MS. ROLLISON: Have any of you been a victim of a racial incident involving a black person?

THE JURY PANEL: (No response.)

MS. ROLLISON: In this case the Defendant is black. The victim was a white female. She was found nude from the waist down.

Do any of you believe that your deliberations might be affected by these facts so as to create any bias [104] or prejudice?

THE JURY PANEL: (No response.)

MS. ROLLISON: Have you discussed this case with anyone?

MS. FELMLEY: Yes.

MS. ROLLISON: Yes, ma'am.

MS. FLEMLEY: Yes. It was in the papers and I certainly discussed it with lots of people.

MR. RISH: Just casually.

MS. ROLLISON: Just casually?

MR. RISH: Yes.

MS. ROLLISON: To both of you, has anyone expressed an opinion about this case to you?

MS. FELMLEY: Yes.

MS. ROLLISON: Did they express an opinion in it?

MS. FELMLEY: Yes.

MS. ROLLSON: Has what you have heard or what you have discussed with people, or what you have read, caused you to have an opinion in this matter—you, yourself have an opinion?

MR. RISH: No.

MS. FELMLEY: No.

[105] MS. ROLLISON: Are you aware of any bias or prejudice that anything you've read, or heard, or discussed might have been created in you? Do you have any bias or prejudice at all?

THE JURY PANEL: (Shaking heads.)

MS. ROLLISON: Mrs. Felmley, you've indicated earlier that you may have a religious or philosophic objection to the death penalty.

MS. FELMLEY: Yes, I have. It's not may have. I do have. I would not—I could not serve on a Jury which would be asked to—I mean I would not vote in favor of the death penalty.

MS. ROLLISON: After hearing the law and the evidence in this case, would you be unable if you were firmly convinced that the circumstances showed, and the evidence showed, and you were given the law and you were given an option of the death penalty, would you be able to vote for death if the case warranted that?

MS. FELMLEY: (Shaking head.)

MS. ROLLISON: Would there be any—

THE COURT: Excuse me. Your answer is?

MS. FELMLEY: No.

MS. ROLLISON: Would there be any [106] circumstances under which you could see voting for imposition of the death penalty?

MS. FELMLEY: No.

MR. EBERT: Your Honor, she's answered the question she could not consider the death penalty.

THE COURT: She can answer the question.

MS. ROLLISON: Thank you.

THE COURT: Do you have any questions, Mr. Ebert?

MR. EBERT: No, sir. I don't have any questions.

THE COURT: I'm going to have to excuse the woman —your name again, please?

MS. FELMLEY: Felmley.

THE COURT: Ms. Felmley, I'm going to have to excuse you.

But for the rest of you that are there, considering what any of you may have heard, read, discussed, or from whatever source of the information you got, is there anyone who could not enter the Jury box with an open mind and wait until the entire case has been presented before reaching a fixed opinion or conclusion as to the guilt or the innocence of the accused?

[107] Is there anyone that could not do that, other than Ms. Felmley?

THE JURY PANEL: (No response.)

THE COURT: Any further questions? Thank you.

Ms. Felmley, I'm going to have to excuse you.

Please take the other three back to the Jury room.

Ms. Felmley, you're free to leave at this time.

Mr. Fulmore, be sure she goes down and leave the other Jurors in the juror assembly room.

* * * *

[111] MS. ROLLISON: As a result of that, has anyone stated an opinion to you about this case?

MS. DEIOTTE: (Nodding head.)

MS. ROLLISON: Has the fact that you've discussed this case, and I believe you indicated that some of you have read in the newspapers about this as well, does the fact that you read or discussed this case cause you to have an opinion in this matter?

THE JURY PANEL: (Shaking heads.)

MS. ROLLISON: Are you aware of any bias or prejudice you might hold after having discussed this case or read about it?

THE JURY PANEL: (Shaking heads.)

* * * *

[113] MS. ROLLISON: Does the fact that you know any of the people that will be appearing today cause you to be aware of any bias or prejudice in this matter?

Would that influence your thinking as a Juror?

(Pause.)

MS. DEIOTTE: No. Only to the extent when one has had contact with people, you know the kind of people that they are and you tend to believe or not believe them because of your previous experience.

But I think that would be true of anybody on a Jury who's lived for a while.

MS. ROLLISON: I'm trying to understand what you're saying to me.

Would the fact that someone you know is testifying—would that cause you to have sort of bias then I guess towards what they're saying, the fact that you would believe them more than any other witness, or not believe them conversely?

MS. DEIOTTE: Possibly.

MS. ROLLISON: If after hearing all the law and evidence in this case, could you take all that into [114] consideration and do you believe that you would be able to disregard your opinions of these people, what you know about them, and render a fair and impartial verdict?

MS. DEIOTTE: Yes.

MS. ROLLISON: But you do believe that your understanding of what they're saying, you might either believe or disbelieve them more or less based on your knowledge of these people's—

MS. DEIOTTE: Yes.

MS. ROLLISON: —credibility?

MS. DEIOTTE: Well, I mean one used to be my next door neighbor for Pete's sake. So if you live next door to somebody it's human nature.

MS. ROLLISON: You've indicated, Ms. Dame, that you've formed no opinions from what you've discussed with people or read in the papers?

MS. DAME: No, I haven't.

MS. ROLLISON: Thank you.

* * * *

[116] THE COURT: All right. Then considering what you've heard, read, or what you know about the case from whatever the source, do you believe that you can enter the Jury box with an open mind, wait until the entire case is presented before reaching a fixed opinion or conclusion as to the guilt or innocence of the accused?

(Pause.)

MS. DEIOTTE: You know, I don't know. I think I could but I just can't say for sure.

THE COURT: Thank you, ma'am.

Anything further?

Thank you. You may take these two.

(Whereupon, the previous two Jurors retired from the Courtroom.)

* * * *

[130] THE COURT: Have you acquired any information about this offense or the accused from the news media or from any source, and if so, would that affect your impartiality in the case?

THE JURY PANEL: (No response.)

THE COURT: Have you acquired any information from any source?

MR. BALL: Yes, newspapers.

MS. GRIFFIN: Newspapers.

THE COURT: Whatever you've read, heard, seen, or discussed, would that information be such to affect your impartiality?

MS. GRIFFIN: No.

MR. BALL: (Shaking head.)

THE COURT: Considering what you have heard, [131] read, or seen, or heard discussed, do you believe you can enter the Jury box with an open mind and wait until the entire case has been presented before reaching a fixed opinion or conclusion as to the innocence or guilt of the accused?

MR. BALL: Yes, sir.

MS. GRIFFIN: Yes, sir.

THE COURT: Do you know of any reason whatsoever why you could not sit today and give a fair and impartial trial based on the law and the evidence?

THE JURY PANEL: (No response.)

* * * *

[139] MS. ROLLISON: Have any of you appeared as a witness for the Prosecution in a criminal cases?

THE JURY PANEL: (No response.)

MS. ROLLISON: Have any of you served on a Jury before?

MS. GRIFFIN: (Shaking head.)

MR. BALL: Yes, ma'am.

MS. ROLLISON: Would the fact that you served on a Jury before cause you to have an opinion in this case?

MR. BALL: It's a different case, different time.

MS. ROLLISON: I understand.

Do you have any bias or prejudice as a result of having sat on a Jury before?

MR. BALL: No, ma'am.

MS. ROLLISON: Would you be able in this case to hear the evidence and the law as presented and after hearing that be able to render a fair and impartial verdict?

MR. BALL: Yes, I could.

* * * *

[142] MS. ROLLISON: Are any of you opposed to the Islamic religion?

MR. BALL: I don't believe in the Islamic religion, but that has nothing to do with whether I could render a fair and impartial verdict.

MS. ROLLISON: So you could set aside your opinion concerning the Islamic religion?

MR. BALL: I don't think that is at issue here. We're not trying the case of Islam.

MS. ROLLISON: Thank you.

Have you discussed this case with anyone?

THE JURY PANEL: (No response.)

MS. ROLLISON: The Judge previously asked you if you have read newspaper accounts of this.

What you've read, or what you discussed, or what you've heard, has that caused either of you to have an opinion in this matter?

MR. BALL: No, because they were not that [143] complete.

MS. GRIFFIN: I read the newspaper a little bit and that was it.

MS. ROLLISON: So neither of you would hold a bias or prejudice for or against one way or the other?

MR. BALL: Not based on the newspaper.

MS. GRIFFIN: No.

MS. ROLLISON: Has anyone expressed an opinion about this case to you?

MR. BALL: No.

MS. GRIFFIN: No.

MS. ROLLISON: Mr. Ball, you indicated to the Judge that you had been pondering his questions about the imposition of a life sentence as opposed to the death penalty.

MR. BALL: Yes, ma'am.

MS. ROLLISON: I gather from some of the other questions that after one has found someone guilty in a case like this, that you would consider—you would certainly consider the death penalty, but you have some problems with considering the imposition of a life sentence?

MR. BALL: I have pondered that many—not [144] just since the start of the case. It really came to light when His Honor asked the question.

But I have dealt with that quite a bit myself in just thinking through what do I believe, and I see a better case for capital punishment in capital cases than I do for life imprisonment.

But then again there may be reasons not to do it and I'm willing to consider those.

MS. ROLLISON: If after hearing all the law and evidence in this case and feeling the way you do about a life sentence, assuming you have found the Defendant

guilty, would you be able to consider the imposition of a life sentence?

MR. EBERT: He's answered the question I think, Your Honor.

THE COURT: Let him answer it again. He's hesitating now.

* * * *

[150] read, or discussed from whatever source and whatever information you have, do you believe that you can enter the Jury box with an open mind and wait until the entire case is presented before reaching a fixed opinion or conclusion as to the innocence or guilt of the accused?

THE JURY PANEL: (Nodding heads.)

THE COURT: Thank you very much. You may step down. Please take them back.

* * * *

[164] THE COURT: Have either of you acquired any information about this alleged offense or the accused from the written media, or the news, or radio, or television, or from any source whatsoever that would affect your impartiality in this case?

MR. ROSENBERGER: No.

MR. FRIEND: No.

THE COURT: In other words, have either one of you acquired any information at all concerning the accused or the offense?

MR. FRIEND: No.

MR. ROSENBERGER: (Shaking head.)

THE COURT: Have either of you expressed or formed an opinion as to the innocence of the accused or guilt of the accused?

[165] THE JURY PANEL: (Shaking heads.)

THE COURT: Have you heard the case discussed in any manner at all or stated in any manner except here today?

MR. FRIEND: No, sir.

MR. ROSENBERGER: (Shaking head.)

THE COURT: Do either one of you know of any reason whatsoever why you should not sit today and subsequent days and listen to the law and the evidence and reach a fair and impartial verdict based upon the law and the evidence?

THE JURY PANEL: (Shaking heads.)

THE COURT: As I'm told, it may go into as much as the rest of this week. Would that cause an undue hardship on either one of you if you had to sit as a Juror for the remainder of this week?

THE JURY PANEL: (Shaking heads.)

THE COURT: Do you know of any reason why you should not be here?

MR. FRIEND: No.

* * * *

SUPREME COURT OF VIRGINIA

Record No. 890899

DAWUD MAJID MU'MIN a/k/a DAVID MICHAEL ALLEN

v.

COMMONWEALTH OF VIRGINIA

March 2, 1990

Present: CARRICO, C.J., COMPTON, STEPHENSON, RUSSELL, WHITING, and HASSELL, JJ., and POFF, Senior Justice.

POFF, Senior Justice.

Dawud Majid Mu'Min, also known as David Michael Allen, was tried by a jury on an indictment charging capital murder. Invoking the three grounds defined in subsections (c), (d), and (e) of Code § 18.2-31 (Repl. Vol. 1988) (now, subsections (3), (4), and (5) of § 18.2-31), the indictment alleged that the killing had been committed while the accused "was a prisoner confined in a State or local correctional facility or while in the custody of an employee thereof, or while in the commission of robbery, while armed with a deadly weapon, or during the commission of or subsequent to rape".

The verdict form submitted to the jury in the first phase of the bifurcated trial quoted the three grounds alleged in the indictment and instructed the jury to "strike out" any ground "that you do not find beyond a reason-

able doubt." The jury marked through the third ground and returned a guilty verdict based upon the first and second grounds.

The verdict form submitted to the jury in the penalty phase of the trial quoted the language of Code § 19.2-264.4(C) defining the "dangerousness" and the "vileness" predicates and instructed the jury to strike out the language of either predicate "if either you do not unanimously find." The jury, "having considered the evidence in mitigation of the offense," returned the form unaltered and "unanimously fix[ed] . . . punishment at death." After reviewing the probation report required by Code § 19.2-264.5, the trial court entered judgment confirming the conviction and imposing the penalty fixed by the jury. We have consolidated the defendant's appeal of the conviction with the automatic review of the sentence, Code § 17-110.1(A) and (F), and accorded both priority on our docket, Code § 17-110.2.

I. THE EVIDENCE

Most of the facts and circumstances related to the attack which led to the victim's death are drawn from the defendant's testimony at trial. Convicted in 1973 of first degree murder and sentenced to a term of 48 years, the defendant was an inmate at Haymarket Field Unit #26. On the morning of September 22, 1988, he and five other prisoners were transported to the Virginia Department of Transportation's Dale City Headquarters (VDOT) where they were assigned to a work detail supervised by a VDOT employee.

During the course of his work that morning, the defendant damaged the point of a screwdriver which he repaired with the use of a bench grinder. At the same time he used the grinder to sharpen a short piece of metal (sometimes referred to as a "highway spike") into the shape of a screwdriver, added a wooden handle, and attached the device to his shirt pocket with a holder fashioned from a paper clip. When the work crew suspended operations for lunch, the defendant crossed the perimeter fence and walked along Interstate Route 95 a distance of approximately a mile to Ashdale Plaza, a shopping center. There, he entered Dale City Floors, a retail carpet store, and inquired of the operator, Mrs. Gladys Napwasky, about oriental carpets.

The defendant challenged the prices she quoted, and a heated argument ensued.[1] According to the defendant, she "started screaming . . . nigger this and nigger that" and "spit in [his] face." The defendant slapped her with his open hand, and she kicked him in the genitals. As the defendant fell to the floor, he "caught the top of her pants" and pulled them "down right . . . by the thighs." Mrs. Napwasky "slashed" at him with a steak knife. The defendant "pushed her off and . . . went straight for the shirt pocket and . . . came up and hit her in the chest and hit her up in the neck." "Blood was coming from the neck." The defendant "checked her pulse to make sure she was okay", placed a wet washcloth on the neck wound, and "took the sleeve of [his] shirt and . . . wiped her face." While searching for a first aid kit, the defendant found four dollars in coins. He explained that he left the store intending to use the coins to purchase ice from a vending machine located in the shopping center to apply to his victim's wounds. Changing his mind, he re-entered the store and "started wiping all the things that [he] could remember that [he] had touched." When he returned to the VDOT, he washed blood from his shoes, took off his bloody shirt, "put it in the trash bag and threw it in the trash can." He discarded the weapon used in the attack along the highway. The defendant testified that he had not raped his victim.

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[1] Other evidence showed, however, that Dale City Floors had not stocked oriental carpets for eleven years.

A customer of the carpet store found Mrs. Napwasky lying on the floor and called a rescue squad. A paramedic testified that he had found her "face up on her back on the floor in a pool of blood that was around her head and upper body"; that she was naked below the waist and her blouse and brassiere had been pulled above her breasts; that although her heart was beating, "she was breathless and pulseless" because there was "no . . . fluid for it to actually pump." The autopsy report identified 16 cuts and puncture wounds on the face, neck, chest, and left arm. A neck wound, three inches deep, severed the jugular vein. A wound four inches deep in the left chest cavity penetrated the left lung. Evidence of numerous "blunt-force trauma injuries" was found on her face and forehead. The victim's genital area was undisturbed.

The Commonwealth introduced the testimony of several of the defendant's fellow inmates concerning his conduct following arrest. One witness testified that the defendant had fallen to his knees, crying and saying that he had killed somebody. Another said that the defendant had told him that he had murdered and robbed his victim. A third prisoner testified that the defendant had conceived an escape plan involving the use of violence. In a search of the defendant's cell while he was awaiting trial, the authorities found a piece of metal taken from a typewriter page stand and an ear bracket from a pair of spectacles. Both appeared to have been sharpened.

II. PRE-TRIAL ISSUES

A. *Constitutional Challenges*

The defendant filed a motion to dismiss the indictment on the ground that the capital murder statutes are unconstitutional. The trial court rejected the several challenges articulated in a detailed memorandum. The defendant incorporated the memorandum in his brief filed in this Court. All the arguments urged by the defendant have been considered and rejected. See the decisions cited

in *Spencer v. Commonwealth*, 238 Va. 563, 568-69, 385 S.E.2d 850, 853-54 (1989); *Watkins v. Commonwealth*, 238 Va. 341, ——, 385 S.E.2d 50, 56-7 (1989); *Buchanan v. Commonwealth*, 238 Va. 389, 412-13, 384 S.E.2d 757, 771 (1989), *cert. denied*, —— U.S. ——, 110 S.Ct. 880, 107 L.Ed.2d 963 (1990); and *Pope v. Commonwealth*, 234 Va. 114, 121-22, 360 S.E.2d 352, 357 (1987), *cert. denied*, 485 U.S. 1015, 108 S.Ct. 1489, 99 L.Ed.2d 716 (1988). We reaffirm our decisions in those cases.

B. *Motion to Suppress*

The trial court overruled the defendant's motion to suppress statements he had made to an officer in two interviews conducted prior to his arrest. Initially, he stated that, upon hearing a scream, he had entered the carpet store to find "a white guy" with "long blond hair" who was ""bending over" with "his pants pulled down" and a "lady . . . laying on the floor" alive but "bleeding through her mouth [and] nose". The white man fled, Mu'Min said, and the defendant "went out the [back] door." Abandoning that account later, the defendant acknowledged that he had entered the store to inquire about an oriental rug and had struck Mrs. Napwasky twice during a bitter quarrel over prices. In significant respects, Mu'Min's two statements were irreconcilably inconsistent. They were no more incriminating than his testimony at trial.

Attacking the trial court's ruling permitting selective portions of his extra-judicial statements to be read into evidence, the defendant contends that his statements were not voluntary because, he says, they were made while he was "incarcerated on a prior charge", while he "was tired and scared", and at a time when he was given no "opportunity to speak with legal counsel." He declares on brief that he "merely said what the Investigator wanted him to say in the misguided belief that the Investigator was going to help him."

> Admissibility of a defendant's statements is an issue to be decided by the [trial] court, which evaluates the credibility of the witnesses, resolves any conflicts in the testimony, and weighs the evidence as a whole. The court must decide whether the defendant knowingly and intelligently relinquished and abandoned his rights. The court's determination is a question of fact based upon the totality of the circumstances. This factual finding will not be disturbed on appeal unless plainly wrong.

Watkins v. Commonwealth, 229 Va. 469, 477, 331 S.E.2d 422, 429-30 (1985) (citations omitted), *cert. denied*, 475 U.S. 1099, 106 S.Ct. 1503, 89 L.Ed.2d 903 (1986).

A review of the transcript of a tape recording of the testimony at the suppression hearing discloses no evidence of coercion. The two interviews were conducted at appropriate hours by a single investigator, the officer fully, definitively, and repeatedly advised Mu'Min of each of his *Miranda* rights, and the defendant expressly waived those rights.

The defendant was qualified, both by training and experience, to make a knowing and voluntary waiver. Mu'Min, a graduate of a private "prep" school, had earned a college degree in business administration and was literate in four languages. In his testimony at the suppression hearing, he acknowledged that, in response to questions propounded to him by the investigator, he had agreed that he understood each element of the *Miranda* warnings, that he knew the interviews were being recorded, and that, because he had been represented by an attorney appointed to defend him at his 1973 murder trial, he was already aware that he was entitled to the advice of counsel. Nevertheless, he readily assented to the question whether he was "willing to talk . . . without consulting a lawyer or having a lawyer present."

We hold that the record completely supports the trial court's ruling denying the defendant's motion to suppress his extra-judicial statements.

C. *Discovery*

Prior to trial, Mu'Min filed a motion to require the Commonwealth to disclose "the factual basis" for a claim of future dangerousness, one of the statutory predicates for the death penalty. Specifically, he requested detailed information concerning evidence of prior convictions, unadjudicated criminal charges, psychological evaluations, and any threatening statements made by the defendant which the Commonwealth intended to introduce at the penalty trial. Defense counsel claimed that, without such information, "the possibility arises of trial by ambush".

The trial court granted the motion, and the Commonwealth complied with the defendant's request. The Commonwealth then moved for disclosure [2] of those "facts in mitigation defendant intends to introduce at the penalty phase". The Commonwealth's Attorney explained that "we are merely asking for the same thing as defense asked of the Commonwealth". Granting the Commonwealth's motion, the court stated that the purpose of discovery is "to prevent total surprise" and that discovery "run [in] both directions".

On appeal, Mu'Min contends that the trial court infringed his due process rights by not limiting the Commonwealth's discovery rights to those granted expressly by Rule 3A:11(c) and Code § 19.2-264.3:1(D).[3] Assum-

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[2] It is of no consequence that both Mu'Min and the Commonwealth labelled their pleadings as motions for bills of particulars. The titles are irrelevant; judged by their substance, the two pleadings are motions for discovery.

[3] If Mu'Min's argument can be read as a claim to a right to surprise or "ambush" the Commonwealth, we reaffirm our recent holding that no such right exists. *Bennett v. Commonwealth*, 236

ing without deciding that, as Mu'Min argues, the trial court erred in granting the Commonwealth's motion, and assuming further that the error was not invited as the Attorney General contends, we hold that any such error was harmless beyond a reasonable doubt.[4]

The information the defendant disclosed was couched in broad generalizations. Indeed, Mu'Min's response to the discovery order contained little more-than a routine recitation of the mitigating factors enumerated in Code § 19.2-264.4(B) and a reference to a "history of psychiatric evaluations". It did not contain the names of any potential witnesses or any other evidence Mu'Min intended to offer. Moreover, the transcript of proceedings at the penalty trial shows that the Commonwealth offered no evidence to rebut the testimony Mu'Min adduced as evidence in mitigation. The defendant cannot logically claim that he was prejudiced by a pre-trial order granting the Commonwealth's discovery motion when his response disclosed nothing which gave the Commonwealth an unfair advantage at trial.

D. *Jury Selection*

1. Content Questions

In advance of trial, defense counsel submitted for approval a list of questions designed, in part, to determine what a prospective juror had seen, read, or heard about the case. Such questions are of a type characterized at bar as "content questions". The trial court refused to allow counsel to propound such questions, and Mu'Min

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Va. 448, 459, 374 S.E.2d 303, 311 (1988), *cert. denied*, —— U.S. ——, 109 S.Ct. 1765, 104 L.Ed.2d 200 (1989).

[4] Although a mere violation of Rule 3A:11(c) or Code § 19.2-264.3:1(D) would not require this "more stringent standard" of harmless error review, *see Dowling v. United States*, —— U.S. ——, ——, 110 S.Ct. 668, 671, 107 L.Ed.2d 708 (1990), we have applied that standard here because Mu'Min frames the issue in constitutional terms.

argues on appeal that the court's refusal constituted "a denial of due process of law" and a violation of his right to "trial by an impartial jury".[5]

Sixteen of the 20 members of the jury panel had indicated on *voir dire* that they had acquired some information from the news media or from conversations with acquaintances. In reply to questions propounded, both by the court and by counsel during the course of an examination that consumed 172 pages of the transcript, all members of the panel attested, collectively and in groups of four, that they had not formed any opinion based upon the information they had acquired, were not sensible of any bias or prejudice, could enter the jury box with an open mind, and were able to render a fair and impartial verdict based upon the law and the evidence admitted at trial.

We agree with the Attorney General that an opportunity to pose the kind of "content questions" the defendant proposed is not a matter of right. *See United States v. Haldeman*, 559 F.2d 31, 67-8 (D.C. Cir. 1976) (en banc), *cert. denied*, 341 U.S. 933, 97 S.Ct. 2641, 53 L.Ed.2d 250 (1977) (affirming trial court's rejection of "content questions" on *voir dire* related to pre-trial publicity). The in-

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[5] Mu'Min also argues that the court's ruling "violated the express mandate of Code § 8.01-358". The defendant refers to the second paragraph of that statute which directs "[a] juror, knowing anything relative to a fact in issue, [to] disclose the same in open court." Construing that statute, we have said:

> A party has no right, statutory or otherwise, to propound any question he wishes, or to extend *voir dire* questioning *ad infinitum*. The court must afford a party a full and fair opportunity to ascertain whether prospective jurors "stand indifferent in the cause," but the trial judge retains the discretion to determine whether the parties have had sufficient opportunity to do so.

LeVasseur v. Commonwealth, 225 Va. 564, 581, 304 S.E.2d 644, 653 (1983), *cert. denied*, 464 U.S. 1063, 104 S.Ct. 744, 79 L.Ed.2d 202 (1984).

formation a person acquires about a case from others may or may not prove to be the facts of the case as developed by evidence admitted at trial. Such information may or may not induce a person to form an opinion before trial. Any opinion formed before trial may or may not affect a person's ability as a juror to reach a different conclusion at trial.

Of course, parties litigant may properly inquire whether a prospective juror has acquired information about the case before trial. It does not follow that litigants have a constitutional right to know what the information is. They are entitled to know only whether the prospective juror, in reliance upon the information acquired, has formed an opinion and, if so, whether the juror can yet "stand indifferent in the cause". Code § 8.01-358; *L.E. Briley v. Commonwealth*, 222 Va. 180, 184-87, 279 S.E.2d 151, 154-55 (1981).

> To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.

Irvin v. Dowd, 366 U.S. 717, 723, 81 S.Ct. 1639, 1643, 6 L.Ed.2d 751 (1961) (citations omitted). Quoting and applying this rule in a later case, the Supreme Court upheld the seating of a juror who had said on *voir dire*, "My experience of [the accused] is such that right now I would find him guilty." *Murphy v. Florida*, 421 U.S. 794, 802 n. 5, 95 S.Ct. 2031, 2037 n. 5, 44 L.Ed.2d 589 (1975).

Here, none of the members seated on the panel had formed an opinion based upon the information acquired before trial, and all had affirmed on oath that they could

stand indifferent in the cause. We hold, therefore, that the trial court did not err in disallowing the content questions proposed by the defendant.

2. Seating Two Jurors

Renewing objections raised during *voir dire*, Mu'Min moved to strike two jurors for cause. On appeal, he contends that the trial court erred in overruling his motions to strike Alexandria Santiago, a prospective alternate, and Gregory Dailey. He argues that Ms. Santiago was not impartial because, he says, she "had patronized Dale City Floors" and referred during *voir dire* to Mrs. Napwasky "by her first name".

The transcript shows that Ms. Santiago had said that she "knew Gladys", that their relationship had been "friendly", but that "we weren't friends." In reply to questions put by defense counsel, she affirmed that her contacts with the victim did not "cause [her] to form an opinion", that she was not "aware of any bias or prejudice", and that she was "able to render a fair and impartial verdict and set aside [her] knowledge of Mrs. Napwasky".

Mu'Min challenges the seating of Mr. Dailey on the ground that "his deliberations would [have been] hampered and rushed by the financial hardship caused by jury service in a lengthy case." According to the record before us, Mr. Dailey made no plea of personal financial hardship. Asked what hardship his service on the jury would cause, he said, "I'm doing telephone communications, and the company I work for is very small and it would jeopardize their business right now." This, he believed, could make him feel "rushed" and "could somewhat hamper" his ability as a juror to deliberate.

Under Code § 8.01-341.2, a person's duty to serve on a jury may be deferred or limited "if serving on a jury . . . would cause such a person a particular occupational inconvenience." The privilege, one the statute makes available at the discretion of the trial court, is purely per-

sonal to the prospective juror and altogether unrelated to the inconvenience suffered by the person's employer.

We find no merit in these assignments of error. Every question contemplated by Code § 8.01-358 and required by Rule 3A:14 was addressed to these prospective jurors by court and counsel. Every response Santiago and Dailey made fully supports the trial judge's conclusion that both were qualified to sit on the jury, and we will uphold his rulings.[6]

III. GUILT TRIAL ISSUES

A. *Evidentiary Rulings*

One of the elements of one of the forms of the offense charged in the indictment was the status of the accused at the time the offense was committed, *i.e.*, that he was then "a prisoner confined in a state or local correctional facility".[7] Code § 18.2-31(c). As proof of Mu'Min's

[6] On brief, Mu'Min also complains generally that "[t]he trial court's voir dire . . . was essentially limited to inquiry whether a juror's views [concerning capital punishment] would prevent, not substantially impair, choosing one punishment or the other." Although the defendant had raised an objection on this ground during *voir dire*, he failed to object to the seating of any juror on that ground. Applying Rule 5:25 in a similar procedural context, we have refused to consider a challenge to a death-qualifying question. "If a party objects to rulings made during the voir dire of a prospective juror, but subsequently fails to object to the seating of that juror, the party has waived the voir dire objections." *Spencer v. Commonwealth*, 238 Va. 295, 306, 384 S.E.2d 785, 793 (1989). We apply that rule to Mu'Min's complaint.

[7] Defining this term, the trial court instructed the jury as follows:

> An inmate of a state correctional facility remains an inmate at all times until he is released from that status by the proper state authority. An inmate who escapes from custody retains the status of inmate during the entire course of such an unauthorized absence.

This is a correct statement of the law in this Commonwealth. *See Ruffin v. Commonwealth*, 62 Va. (21 Gratt) 790, 793-94 (1871); *see also Jefferson v. Commonwealth*, 214 Va. 747, 752, 204 S.E.2d 258, 262 (1974).

status, the Commonwealth offered in evidence at the guilt trial a copy of the order of conviction of first degree murder entered against Mu'Min in 1973. In keeping with its ruling against a motion that defense counsel had made *in limine*, the trial court admitted the order over the defendant's objection. On appeal, the defendant argues that evidence of prior crimes is inevitably prejudicial and that references the Commonwealth's Attorney made in the presence of the jury to the facts disclosed by that order compounded the prejudice. Accordingly, the defendant maintains that the trial court's rulings constituted reversible error. We do not agree.

A transcript of Mu'Min's interview with the investigator in which, eventually, he confessed his assault upon Mrs. Napwasky was read to the jury. As the following excerpt reveals, the defendant initiated several references to his prior conviction and to the sentence imposed.

> WATSON: You tried to wipe off your fingerprints?
> MU'MIN: Wipe my fingerprints off.
> WATSON: Why did you do that?
> MU'MIN: Because I'm a convicted murderer.
>
> * * * *
>
> WATSON: Why didn't you come forward with this story earlier?
> MU'MIN: Because I'm a convicted murderer.
>
> * * * *
>
> MU'MIN: I know what you're—it's the same thing back in '73. . . . When I got this murder charge I was sitting home. My aunt and my uncle both in the house, testified that I was home when a shot was fired, but because of certain physical evidence that they picked up, they had similarities and someone who said that he thought he saw me by the way some-

one walked, I've been sitting in the penitentiary since this, since this '73 incident, the last 15 years. . . .

* * * *

MU'MIN: I mean how can it—that look, you know, how can that look good for me? I'm a convicted murderer.

WATSON: Think about it.

MU'MIN: Serving a 48 year sentence.

These several references, integral parts of a confession we have found to be voluntary, were competent evidence. *See Boggs v. Commonwealth*, 229 Va. 501, 517, 331 S.E.2d 407, 419 (1985), *cert. denied* 475 U.S. 1031, 106 S.Ct. 1240, 89 L.Ed.2d 347 (1986); *Bowman v. Commonwealth*, 174 Va. 461, 463, 5 S.E.2d 497, 498-99 (1939). We hold, therefore, that error, if any, resulting from the trial court's rulings concerning the 1973 order of conviction was rendered harmless by the defendant's own account of the same facts disclosed by that order. *See Schindel v. Commonwealth*, 219 Va. 814, 817, 252 S.E.2d 302, 304 (1979) (hearsay error rendered harmless by defendant's "own testimony corroborating the factual details").

Challenging another evidentiary ruling, Mu'Min argues that the trial court erred in excluding from the evidence a copy of a VDOT departmental regulation. The defendant offered the document to show that a VDOT employee assigned to supervise his work crew had not taken an oath as a peace officer as required by the regulation and, hence, that at the time the victim was killed, he was not "a prisoner . . . in the custody of an employee [of a correctional facility]" within the contemplation of Code § 18.2-31(c).

We need not consider this issue. The jury finding in the language of § 18.2-31(c) was only one of the bases for the guilty verdict. The jury also rested its verdict

upon its finding in the language of § 18.2-31(d) that Mu'Min committed the killing "during the commission of robbery while . . . armed with a deadly weapon." Consequently, the issue raised on appeal is moot. *Cf. Zant v. Stephens*, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983) (death penalty upheld although one of three statutory aggravating circumstances subsequently declared invalid); *accord Poyner v. Commonwealth*, 229 Va. 401, 427, 329 S.E.2d 815, 830, *cert. denied*, 474 U.S. 888, 106 S.Ct. 208, 88 L.Ed.2d 178 (1985); *Tuggle v. Commonwealth*, 230 Va. 99, 110, 334 S.E.2d 838, 845 (1985), *cert. denied* 478 U.S. 1010, 106 S.Ct. 3309, 92 L.Ed.2d 722 (1986); *Stout v. Commonwealth*, 237 Va. 126, 134, 376 S.E.2d 288, 292, *cert. denied*, —— U.S. ——, 109 S.Ct. 3263, 106 L.Ed.2d 609 (1989).

B. *Jury Instructions*

The defendant assigns error to the trial judge's rulings refusing four instructions relating to Mu'Min's contention that he was not a prisoner within the intendment of Code § 18.2-31(c) and his ruling granting the Commonwealth's instruction to the contrary (see footnote 7 *supra*). For the reason just stated, we need not address these assignments of error.

Mu'Min also questions another ruling on another instruction granted by the trial court. Instruction number 1 defined capital murder in terms of the three statutory definitions charged in the indictment and the elements of the lesser-included offenses of first and second degree murder and voluntary manslaughter. The defendant believes that the instruction defined first degree murder and the standard of proof incorrectly and that the trial court erred in refusing his substitute draft.

In pertinent part, instruction number 1 told the jury that if they failed to find any of the three predicates for capital murder,

but find that the Commonwealth has proved beyond a reasonable doubt:

(1) That the defendant killed Gladys Napwasky; and

(2) That the killing was malicious; and

(3) That the killing was willful, deliberate and premeditated,

then you shall find him guilty of first degree murder. . . .

We find no error in this instruction. Indeed, we see no material difference between this definition and that of the substitute draft, and we reject the defendant's complaint.

IV. PENALTY TRIAL ISSUES

A. *Passion or Prejudice*

Whenever the death penalty is imposed, this Court is required to review the record to determine "[w]hether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor". Code § 17-110.1(C)(1). The defendant claims that the trial court committed error by refusing the jury's request for a definition of the particulars of a life sentence. We disagree. Rejecting a similar claim in an earlier capital case, we said that the jury's question actually "tends to show that the jury's deliberations were dispassionate, unprejudiced, and guided by earnest consideration of every factor relevant to the portentous decision they were required to make." *Delong v. Commonwealth*, 234 Va. 357, 370, 362 S.E.2d 669, 676 (1987), *cert. denied*, 485 U.S. 929, 108 S.Ct. 1100, 99 L.Ed.2d 263 (1988).

The defendant also suggests that the jury's penalty decision was the result of some "other arbitrary factor". The defendant offered in evidence at the penalty trial a copy of a departmental regulation providing that "[a]

prisoner . . . shall not be left without supervision at any time." In response to the Commonwealth's objection, the trial judge said, "I question the relevancy. . . ." The defendant urges us to commute the sentence of death on the ground that the judge's comment influenced the jury "to disregard a major component of the defendant's evidence in mitigation."

For two reasons, we decline to do so. First, the transcript shows that the judge's comment was made to the attorneys in a side-bar conference. Having in mind the purpose of such a conference, we think it is unlikely that the comment was heard by the jury. Second, even if the comment was overheard, the trial court's decision to overrule the Commonwealth's objection and admit the document for the jury's consideration cured any prejudice the comment may have caused.

Having conducted a thorough review of the voluminous record of both phases of the trial, we find nothing to show that the penalty imposed by the jury and confirmed by the trial court was the product of passion, prejudice, or other arbitrary factor.

B. *Propriety of the Sentence*

As required by Code § 17-110.1(C)(2), we must now determine "whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant."

1. Excessiveness

A death penalty is inherently excessive unless it is based upon what has come to be known as the "dangerousness predicate" or the "vileness predicate". Code § 19.2-264.4(C) provides:

> The penalty of death shall not be imposed unless the Commonwealth shall prove beyond a reasonable doubt that there is a probability based upon evidence

> of the prior history of the defendant or of the circumstances surrounding the commission of the offense of which he is accused that he would commit criminal acts of violence that would constitute a continuing serious threat to society, or that his conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery to the victim.

Tracking the language of the statute as incorporated in the court's instruction number 1, the jury's verdict based the death penalty upon both predicates.

The defendant challenges the jury's finding of the vileness predicate because, he says, the Commonwealth's Attorney failed "to include torture in his bill of particulars" and "the evidence . . . did not establish torture."[8] We think the evidence of the multiple, grievous wounds inflicted upon Mrs. Napwasky was sufficient to prove torture, *see Tuggle v. Commonwealth*, 228 Va. 493, 516, 323 S.E.2d 539, 553 (1984), *vacted and remanded on other grounds*, 471 U.S. 1096, 105 S.Ct. 2315, 85 L.Ed.2d 835 (1985) ("torture" correctly included in vileness instruction where evidence was sufficient to show victim, "[w]hile still alive, . . . was severely bruised and bitten on her breast"). However, it is immaterial that the jury instruction and the jury's verdict contained the word "torture" when the bill of particulars did not. It is immaterial because, as defined in Code §§ 19.2-264.2 and -264.4(C), "the term 'vileness' includes three separate

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[8] In another argument advanced on brief, Mu'Min says that "the sentence of death is excessive" because, had the government "exercised rudimentary care in supervision of the defendant, this crime would not have been committed." In effect, the defendant argues that an escapee who commits murder is entitled to immunity from the death penalty for his intrepidity in escaping supervision. We are unpersuaded.

and distinct factors, with proof of any one factor being sufficient to support a finding of vileness and hence a sentence of death." *Bunch v. Commonwealth*, 225 Va. 423, 442, 304 S.E.2d 271, 282, *cert. denied*, 464 U.S. 977, 104 S.Ct. 414, 78 L.Ed.2d 352 (1983).

The autopsy report identified 16 cuts and puncture wounds on the victim's face, neck, chest, and left arm and numerous blunt-force injuries to the face and forehead. Clearly, the evidence was sufficient to prove an "aggravated battery", *i.e.*, "a battery which, qualitatively and quantitatively, is more culpable than the minimum necessary to accomplish an act of murder." *M. Smith v. Commonwealth*, 219 Va. 455, 478, 248 S.E.2d 135, 149 (1978), *cert. denied*, 441 U.S. 967, 99 S.Ct. 2419, 60 L.Ed.2d 1074 (1979). Indeed, a single stab wound may, under certain circumstances, be sufficient to satisfy this definition. *See, e.g., Stout v. Commonwealth*, 237 Va. at 132-33, 376 S.E.2d at 291-92; *Edmonds v. Commonwealth*, 229 Va. 303, 313, 329 S.E.2d 807, 814, *cert. denied*, 474 U.S. 975, 106 S.Ct. 339, 88 L.Ed.2d 324 (1985).

In light of the "evidence of the prior history of the defendant [and] of the circumstances surrounding the commission of the offense", Code § 19.2-264.4(C), we think the jury was entirely justified in finding that the defendant "would constitute a continuing serious threat to society", *id.* We need not recite the details of that evidence. It is enough that we have found proof of the vileness predicate sufficient to support the imposition of the death penalty. "When a jury makes separate findings of specific statutory aggravating circumstances, any of which could support a sentence of death, and one of the circumstances subsequently is invalidated, the remaining valid circumstance, or circumstances, will support the sentence." *Tuggle v. Commonwealth*, 230 Va. at 110, 334 S.E.2d at 845, quoted with approval in, *Stout v. Commonwealth*, 237 Va. at 134, 376 S.E.2d at 292.

2. Disproportionality

Code § 17-110.1(C)(2) requires us to compare the case under review with "similar cases" in making our determination whether "the sentence of death is excessive or disproportionate". To facilitate that comparison as directed in § 17-110.1(E), we have accumulated the records in all capital murder cases to come before this Court (including those in which the penalty imposed was a life sentence) and stored and indexed those records apart from those in all other criminal cases. In selecting cases from that inventory for purposes of our comparison, we give special attention to those in which the death penalty was based upon the same statutory predicate (or predicates) as that underlying the penalty under review.

The cases in which the death penalty was based, as it was here, upon both the "future dangerousness" predicate and the "vileness" predicate are collected and annotated in our recent opinion in *Spencer v. Commonwealth*, 238 Va. 295, 319-20, 384 S.E.2d 785, 799-800 (1989). *See also R. Smith v. Commonwealth*, 239 Va. ——, 389 S.E.2d 871 (1990). We have compared the records in those cases with that in the case at bar, and we are satisfied that "juries in this jurisdiction generally approve the supreme penalty for comparable or similar crimes." *Stamper v. Commonwealth*, 220 Va. 260, 284, 257 S.E.2d 808, 824 (1979), *cert. denied*, 445 U.S. 972, 100 S.Ct. 1666, 64 L.Ed.2d 249 (1980).

V. INEFFECTIVE ASSISTANCE OF COUNSEL

By counsel appointed specially, Mu'Min charges that his trial lawyer was ineffective because he failed at the penalty trial to submit certain instructions and to object to several instructions as well as to the verdict form approved by the trial court. These failures, he says, are patently prejudicial and unjustifiable by any acceptable explanation. In *Beaver v. Commonwealth*, 232 Va. 521,

352 S.E.2d 342, *cert. denied*, 483 U.S. 1033, 107 S.Ct. 3277, 97 L.Ed.2d 781 (1987), we rejected just such a claim.

> Defendant complains of errors of omission committed by his trial counsel. Yet the record contains no testimony from trial counsel concerning his alleged acts of omission. Were we to attempt to dispose of defendant's contentions on this record, we would be called upon to declare the work of an attorney to be ineffective without that attorney having an opportunity to explain his conduct. [citation omitted.]
>
> The defendant argues, however, that though the record does not contain everything that relates to the question of ineffective assistance of counsel, it contains enough to establish that trial counsel failed to do things that obviously should have been done and for which there can be no acceptable explanation. However, [Code § 19.2-317.1] does not say that we can proceed where there is partial evidence of ineffectiveness. The statute presupposes a full record on the very issue that is the basis for the claim of effective assistance of counsel. We conclude, therefore, that defendant's claim of ineffective assistance of trial counsel cannot be raised in this appeal.

Id. at 537-38, 352 S.E.2d at 351-52.

Applying the qualifying language of Code § 19.2-317.1,[9] we remain committed to our previous rulings. Trial counsel will not be exposed to the possibility of professional disgrace with "an opportunity to defend himself on the record by giving the rationale for his challenged acts of omission or commission". *Correll v. Commonwealth*, 232 Va. 454, 470, 352 S.E.2d 352, 362, *cert. de-*

[9] Code § 19.2-317.1 provides:

> A claim of ineffective assistance of counsel may be raised on direct appeal if assigned as error and if all matters relating to such issue are fully contained within the record of the trial.

nied, 482 U.S. 931, 107 S.Ct. 3219, 96 L.Ed.2d 705 (1987); *accord Frye v. Commonwealth*, 231 Va. 370, 400, 345 S.E.2d 267, 287-88 (1986). *See R. Smith*, 239 Va. at —— n. 5, 389 S.E.2d at 886 n. 5. Mu'Min's claim of ineffective assistance of counsel cannot be considered in this appeal.

VI. CONCLUSION

Finding no reversible error in the conduct of either phase of the bifurcated trial and no cause to commute the death sentence, we will affirm the judgment confirming the jury's two verdicts.

Affirmed.

WHITING, J., with whom STEPHENSON and HASSELL, JJ., join, dissenting.

I cannot agree that the trial court correctly excluded all of the questions intended for the 16 prospective jurors who said they had acquired pretrial information about the offense. A trial court's assessment of prospective jurors' potential for bias is presumptively correct, *Patton v. Yount*, 467 U.S. 1025, 1036, 104 S.Ct. 2885, 2891, 81 L.Ed.2d 847 (1984); *Pope v. Commonwealth*, 234 Va. 114, 124, 360 S.E.2d 352, 358 (1987), absent manifest error, *Patton*, 467 U.S. at 1031-32 n. 7, 104 S.Ct. at 2889 n. 7; *Irvin v. Dowd*, 366 U.S. 717, 723, 81 S.Ct. 1639, 1643, 6 L.Ed.2d 751 (1961); *Pope*, 234 Va. at 124, 360 S.E.2d at 358. In this case, however, I believe there was "manifest error" in refusing to permit *any* of the questions necessary to establish a factual and objective basis for assessing juror impartiality.

The record discloses an unusual amount of pretrial publicity. The charge involved the alleged capital murder of a local resident by a convict who was serving a part of his sentence for first degree murder as a member of a road gang. After this murder, county officials and local

citizens publicly expressed surprise, outrage, and fear for the safety of local residents upon discovery that prisoners like Mu'Min, who had been convicted of violent crimes, were permitted to work in such close contact with the public.

When the prospective jurors were assembled, 16 of them responded affirmatively to the question of whether they had "acquired any information from the news media or from any other source" regarding the offense. The trial court then asked:

> Would the information that you heard, received, or read from whatever source, would that information affect your impartiality in this case?
>
> Is there anyone that would say what you've read, seen, heard, or whatever information you may have acquired from whatever the source would affect your impartiality so that you could not be impartial?
>
> . . . .
>
> In view of everything that you've seen, heard, or read, or any information from whatever source that you've acquired in this case, is there anyone who believes that you could not become a Juror, enter the Jury box with an open mind and wait until the entire case is presented before reaching a fixed opinion or a conclusion as to the guilt or innocence of the accused?

Only one prospective juror responded to these inquiries; the balance remained silent. That prospective juror was excused for cause when he said he could not be impartial.

Because of the trial court's ruling, we do not know what the prospective jurors had read or heard about the case before trial. We do know, however, that the following information regarding the accused, not a part of the evidence at the guilt phase of trial, was published in the local papers:

1. His suspected assault upon a fellow prisoner, resulting in a broken nose.

2. His citation for 23 prison violations and his rejection for parole on six previous applications.

3. His 1973 conviction for the murder and robbery of a Grayson County cab driver, with some details of the crime and a statement from the Grayson County prosecutor that the death penalty was not available when the accused was convicted.

4. His juvenile record in New York and Virginia.

5. His alleged commission of a burglary and engagement in "Peeping Tom" activities while a prisoner. Also, there were indications that a rape may also have been involved in the commission of this murder.

An accused has statutory and constitutional rights to trial by an impartial jury. I do not believe that defense counsel was afforded a meaningful voir dire examination of prospective jurors, as mandated by Code § 8.01-358. The majority disposes of this contention in a footnote (n. 3) by relying upon *LeVasseur v. Commonwealth*, where we said that "[a] party has no right, statutory or otherwise, to propound any question he wishes, or to extend *voir dire* questioning *ad infinitum*." 225 Va. at 581, 304 S.E.2d at 653. Nothing in the record in the present case, however, suggests that defense counsel sought to "propound any question he wishe[d], or to extend *voir dire* questioning *ad infinitum*."

Code § 8.01-358 mandates that "counsel for either party shall have the right to examine under oath any person who is called as a juror . . . and shall have the right to ask such person . . . directly any relevant question to ascertain whether he . . . is sensible of any bias or prejudice." The section further provides that "[a] juror, knowing anything relative to a fact in issue, shall disclose the same in open court." Code § 8.01-358. More-

over, as we said in *LeVasseur*, "[t]he court must afford a party a full and fair opportunity to ascertain whether prospective jurors 'stand indifferent in the cause.'" 225 Va. at 581, 304 S.E.2d at 653.

In enacting Code § 8.01-358, the General Assembly intended to provide counsel a meaningful voir dire examination. Clearly, questions pertaining to what a prospective juror had seen, read, or heard about the case are "relevant . . . to ascertain whether he . . . is sensible of any bias or prejudice." Therefore, the court violated Mu'Min's statutory right to trial by an impartial jury.

Additionally, "[u]nder the Federal and State Constitutions, U.S. Const. amends. VI and XIV; Va. Const. art. 1, § 8, an accused has a right to trial by an 'impartial jury.'" *Wm. Patterson v. Commonwealth*, 222 Va. 653, 658, 283 S.E.2d 212, 215 (1981). As illustrated by the majority opinion, —— Va. at ——, 389 S.E.2d 892, we frequently apply federal decisions construing the Sixth Amendment right to an impartial jury in construing this same right under art. 1, § 8 of the Virginia Constitution. *See also, Mackall v. Commonwealth*, 236 Va. 240, 251, 372 S.E.2d 759, 766 (1988), *cert. denied*, —— U.S. ——, 109 S.Ct. 3261, 106 L.Ed.2d 607 (1989).

An accused's right to trial by an impartial jury is violated if jurors are impanelled after an inadequate voir dire examination. *See, e.g., Turner v. Murray*, 476 U.S. 28, 106 S.Ct. 1683, 90 L.Ed.2d 27 (1986). If the examination is inadequate, the accused's right is prejudiced in two respects; he is unable to exercise effectively his right of challenge, *United States v. Dellinger*, 472 F.2d 340, 368 (7th Cir. 1972), *cert. denied*, 410 U.S. 970, 93 S.Ct. 1443, 35 L.Ed.2d 706 (1973), and the trial court is unable to assess fairly the prospective jurors' impartiality. *United States v. Davis*, 583 F.2d 190, 197-98 (5th Cir. 1978).

Thus, when there has been unusual pre-trial publicity in a criminal case, the Supreme Court has said that there

must be "fair support in the record for the state courts' conclusion that the jurors . . . would be impartial." *Patton*, 467 U.S. at 1038, 104 S.Ct. at 2892. Moreover, where prospective jurors have indicated that they were exposed to pretrial publicity in response to questions similarly to those posed in this case, we have warned: "[T]he *proof* that [a prospective juror] is impartial and fair, should *come from him* and not be based on his mere assent to persuasive suggestions." *Breeden v. Commonwealth*, 217 Va. 297, 300, 227 S.E.2d 734, 736 (1976) (emphasis added) (citations omitted).

In other words, "in the absence of an examination designed to elicit answers which provide an *objective basis* for the court's evaluation, 'merely going through the form of obtaining jurors' assurances of impartiality is insufficient. . . .'" *Silverthorne v. United States*, 400 F.2d 627, 638 (9th Cir. 1968) (emphasis added) (citations omitted). In at least two of our cases involving pretrial publicity, we have said that a trial court should have rejected such subjective assurances. *Justus v. Commonwealth*, 220 Va. 971, 977, 266 S.E.2d 87, 91 (1980); *Breeden*, 217 Va. at 298-300, 227 S.E.2d at 736-37. "[H]owever willing the juror might be to trust himself, the law will not trust him." *Breeden*, 217 Va. at 298, 227 S.E.2d at 735 (citations omitted).

Accordingly, whether a juror can impartially render a verdict "should not be [based] on that juror's [subjective] assessment of self-righteousness without something more." *Silverthorne*, 400 F.2d at 639. Instead, a trial court must objectively and independently assess each prospective juror's state of mind.

> When a juror is exposed to potentially prejudicial pretrial publicity, it is necessary to determine whether the juror can lay aside any impression or opinion due to the exposure. The juror is poorly placed to make a determination as to his own impartiality. Instead, the *trial covrt* should make this determination.

Jordan v. Lippman, 763 F.2d 1265, 1274 (11th Cir. 1985) (emphasis added) (citation omitted). "The issue of who is, or is not, a competent juror is one for the trial court to decide," *Justus*, 220 Va. at 976, 266 S.E.2d at 91, not the juror himself.

Furthermore, I believe the questions in this case were deficient in that the prospective jurors could simply remain silent as an implied indication of a lack of bias or prejudice. This gave the trial court no effective opportunity to assess the demeanor of each prospective juror in disclaiming bias. Moreover, even if the court had required an express affirmation of each prospective juror, such an affirmation would have required an admission of bias or prejudice before the assembled panel. "No doubt each juror was sincere when he said that he would be fair and impartial to the [accused], but the psychological impact requiring such a declaration before one's fellows is often its father." *Irvin*, 366 U.S. at 728, 81 S.Ct. at 1645.

Apparently, we have never addressed the *necessity* of such questions at voir dire, where panel members have been exposed to unusual pretrial publicity. However, we have ample precedent for such questions. In *Greenfield v. Commonwealth*, 214 Va. 710, 204 S.E.2d 414 (1974), the trial court sought a description of what was actually remembered by those prospective jurors who had been subjected to pretrial publicity. There, we sustained the trial court's objective findings regarding the impartiality of those prospective jurors, who we noted had remembered few of the details of such publicity. *Id.* at 717, 204 S.E.2d at 420. Although not the subject of our discussion, an inspection of the appendices in the following cases indicates that "content" questions were likewise asked of prospective jurors exposed to pretrial publicity. *Mackall*, 236 Va. 240, 372 S.E.2d 759 (1988); *LeVasseur*, 225 Va. 564, 304 S.E.2d 644 (1983), *cert. denied*, 464 U.S. 1063,

104 S.Ct. 744, 79 L.Ed.2d 202 (1984); *Bassett v. Commonwealth*, 222 Va. 844, 284 S.E.2d 844 (1981), *cert. denied*, 456 U.S. 938, 102 S.Ct. 1996, 72 L.Ed.2d 458 (1982); *Justus*, 220 Va. 971, 266 S.E.2d 87; *Breeden*, 217 Va. 297, 227 S.E.2d 734; *Greenfield*, 214 Va. 710, 204 S.E.2d 414.

The questions proffered by the accused,[1] and refused by the court, were clearly designed to provide a factual and objective basis for assessing the potential for bias.[2] Some prospective jurors may honestly have felt that the publicity had not affected their impartiality; however, a disclosure of what was actually remembered could lead an impartial observer to conclude that there was a bias of which the potential juror was unaware, as in *Justus* and *Breeden*. "Voir dire examination serves to protect [the right to a fair trial] by exposing possible biases, both known and unknown, on the part of potential jurors." *McDonough Power Equipment v. Greenwood*, 464 U.S. 548, 554, 104 S.Ct. 845, 849, 78 L.Ed.2d 663 (1984).

I believe that the majority's citation of *United States v. Haldeman*, 559 F.2d 31 (D.C. Cir. 1976), for the proposition that the opportunity to ask "content questions" is "not a matter of right," misconstrues the essence of that holding. The *Haldeman* Court explicitly agreed that a certain ABA Standard "mandate[d] an inquiry into the *sources and intensity* of a venireman's exposure to pretrial publicity, not an inquiry into his recollection of the content of that publicity." *Id.* at 69 (emphasis added). Moreover, emphasizing that the voir dire in *that* defendant's case permitted counsel to determine the *nature and intensity of the exposure* to pretrial publicity, the Court stated:

> We agree that it would have been reversible error for the Court to accept jurors simply because they said they would be fair. . . . In this case, however, the Court had before it and acted on not only the jurors' subjective assurances but also *objective information* relating how closely they had followed Watergate and their *sources* of information.

Id. at 67 n. 51 (citations omitted) (emphasis added). In addition, *Haldeman* distinguished *Dellinger* and *Silverthorne*, two cases involving constitutionally inadequate voir dire, on the ground that the trial courts in those cases failed to permit *any* questions concerning the source and intensity of exposure to pretrial publicity. *See id.* at 69.

As in *Dellinger* and *Silverthorne*, the trial court in this case rejected *all* voir dire questions aimed at determining the source and intensity of exposure to pretrial publicity, as well as "content" questions. In my view, it was not necessarily error to preclude some or even all of the "content" questions; however, the trial court's conduct of voir dire was constitutionally inadequate, even under *Haldeman*, in its blanket refusal to permit *any* questions aimed at determining the *sources and intensity* of exposure to pretrial publicity (e.g., where did you hear about this case; how many times did you hear about it; and when did you hear about it).

---

[1] The tenor of the proffered questions was: What have you seen, read or heard about this case; from whom did you get this information; when and where did you get this information; have you discussed this case with anyone; with whom; when and where; what did you discuss; if an opinion had been informed, what is it; has anyone expressed an opinion about this case to you; who; what; when; and where?

[2] Without necessarily approving each of the proffered questions, if the trial court permits no questions regarding the source and extent of exposure of pretrial publicity, and, therefore, content questions are necessary, at a minimum, I believe each prospective juror subjected to pretrial publicity should have been asked what information he recalled and when it was received. Moreover, the risk of "tainting" the other prospective jurors could have been minimized by excluding the others from the courtroom during each examination, or by examining them in smaller groups, as the court did.

In my opinion, under the circumstances of this case, the refusal to permit any questions regarding the source and intensity of knowledge regarding pretrial publicity violated the accused's statutory and constitutional right to trial by an impartial jury. Although I agree with the majority opinion in all other respects, I would reverse the judgment of the trial court and remand the case for a new trial at which appropriate voir dire questions should be asked.

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 2nd day of March, 1990.

Record No. 890899

Circuit Court No. 23103

DAWUD MAJID MU'MIN, a/k/a DAVID MICHAEL ALLEN,
Appellant,

against

COMMONWEALTH OF VIRGINIA,
Appellee.

Upon an appeal of right from a judgment rendered by the Circuit Court of Prince William County on the 12th day of June 1989.

For reasons stated in writing and filed with the record, the Court is of opinion that there is no error in the judgment appealed from. Accordingly, the judgment is affirmed.

It is ordered that the said circuit court allow counsel for the appellant on the merits and on the issue of ineffective assistance of counsel, each a fee of $1,550 for services rendered the appellant on this appeal, in addition to counsel's costs and necessary direct out-of-pocket expenses.

This order shall be certified to the said circuit court.

A Copy,

Teste:

/s/ [Illegible]
Clerk

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 20th day of April, 1990.

Record No. 890899

Circuit Court No. 23103

DAWUD MAJID MU'MIN, a/k/a, ETC.,
Appellant,

against

COMMONWEALTH OF VIRGINIA,
Appellee.

Upon a Petition for Rehearing

On consideration of the petition of the appellant to set aside the judgment rendered herein on the 2nd day of March, 1990 and grant a rehearing thereof, the prayer of the said petition is denied.

A Copy,

Teste:

/s/ [Illegible]
Clerk

SUPREME COURT OF THE UNITED STATES

No. 90-5193

DAWUD MAJID MU'MIN,
Petitioner

v.

VIRGINIA

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted limited to Questions 1 and 2 presented by the petition.

October 9, 1990

Justice Souter took no part in the consideration or decision of this petition.